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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 513. ~~245~~ 25

MORRIS RICHTER, APPELLANT,

vs.

GEORGE JEROME, SURVIVOR OF GEORGE JEROME AND FERNANDO C. BEAMAN, ASSIGNEES IN BANKRUPTCY OF THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED APRIL 23, 1884.

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a *Amended Bill of Complaint.*

In the Circuit Court of the United States for Northern Division of the Western District of Michigan. In Chancery.

MORRIS RICHTER
vs.
THE UNION TRUST COMPANY OF NEW YORK *and others.*

J. P. Whittemore, solicitor and of counsel for plaintiff.

1 UNITED STATES OF AMERICA:

To the judges of the circuit court of the United States for the sixth circuit, and northern division of the western district of Michigan:

Morris Richter, of St. Louis, in the State of Missouri, who is a citizen of the State of Missouri, brings this his bill of complaint against the Union Trust Company of New York, a corporation organized under the laws of the State of New York, and which is a citizen of New York. And George Jerome and Fernando C. Beaman, assignees in bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, who are citizens of the State of Michigan. And Josephine Ayer, widow of James C. Ayer, late of the city of Lowell, in the State of Massachusetts, now deceased, who resides in the city of New York, and who is a citizen of the State of New York. And Leslie Josephine Ayer, daughter of said James C. Ayer, deceased; and Henry Ayer, son of said James C. Ayer, deceased, who are both citizens of the State of New York, residing with their mother in said city of New York. And Frederick F. Ayer, another son of said James C. Ayer, who is a citizen of the State of Massachusettts, residing at the city of Boston, in said State; said last named four defendants being the widow and only heirs-at-law of the said, the late James C. Ayer, deceased; and the said Frederick F. Ayer and Benjamin Dean and Jacob Rogers, trustees under the will of said James C. Ayer, deceased, the two last named of whom are citizens of the State of Massachusetts, defendants. And thereupon your orator complains and shows unto your honors:

2 That on or about the fourth day of July, 1864, a corporation known and designated by the name of The Portage Lake and Lake Superior Ship Canal Co. was duly organized, and created under the laws of the State of Michigan, the object and purpose of which corporation was to construct, own and operate, collect and receive tolls for the use of a ship canal to extend from the most westerly point of Portage Lake through a neck of land called "The Portage," into Lake Superior, as from the original articles of association of said corporation now on file in the office of the secretary of State of the State of Michigan, will more fully appear, to which, for greater certainty and particularity, your orator prays leave to refer and make the same a part of this bill of complaint.

That on the 3rd day of March, A. D. 1865, the Congress of the United States, by an act approved on that day, granted to the State of Michigan two hundred thousand acres of land of the United

States, lying in the State of Michigan, to aid in the construction of a ship canal, upon the route, and from and to the same points as designated in the articles of association of the Portage Lake and Lake Superior Ship Canal Company, and that on or about the 18th day of March, 1865, the Legislature of the State of Michigan, by an act approved on that day, accepted said grant of land, so, as aforesaid, made by Congress of the State of Michigan, and conferred the same upon the said Portage Lake and Lake Superior Ship Canal Company, which said grant, for the purposes of this bill, will be hereinafter referred to as the "First Congressional Land Grant."

3 That on or about the 31st day of July, 1866, the Congress of the United States, by an act approved on that day, entitled, "An act granting lands to the State of Michigan, to aid in the construction of a harbor, and ship canal at Portage Lake to Keweenaw Point, Lake Superior, in said State, granted to said State to aid in the building of said canal and harbor, two hundred thousand acres of land, in addition to two hundred thousand granted for the purpose as hereinbefore stated, said lands to be selected as in said act provided, and it was in and by said act provided that the grant of lands thereby made, should inure to the use and benefit of said Portage Lake and Lake Superior Canal Company, in accordance with an act of the Legislature of said State of Michigan, conferring said prior grant upon said company, to which said act of Congress, for greater certainty and particularity, reference is hereby made as a part of this bill.

In the year of our Lord one thousand eight hundred and sixty-three, and about the first day of March, of that year, the Congress of the United States, by an act approved on that day, and entitled, "An act granting land to aid in the construction of a military road from Fort Wilkinson, Copper Harbor, Keweenaw county, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin," granted every alternate section of public lands designated by even numbers for three sections in width on each side of said road to the State of Michigan, from Fort Wilkins, Copper Harbor, to Houghton, Portage Lake, and thence in a southerly direction to the State line of Wisconsin, to aid in the construction of said military road, to which act of Congress, for greater certainty, your orator prays leave to refer as a part of this bill.

4 That the Legislature of the State of Michigan, by an act approved on the fourth day of February, one thousand eight hundred and sixty-four, entitled, "An act to accept the grant of land made to the State of Michigan by the United States, to aid in the construction of a military road, etc.," accepted said grant of land, and authorized and empowered the governor of said State to appoint one or more commissioners to dispose of said lands, so granted to said State by the Congress of the United States, for the construction of said military road, and to the act of said Legislature reference is hereby made as a part of this bill for greater certainty, and as will more fully and particularly appear.

That the governor of said State of Michigan, under and in pur-

suance of the power vested in him by said act of the Legislature of the State of Michigan last aforesaid, appointed one Ransom Sheldon, of Houghton, in the county of Houghton, a commissioner on the part and behalf of said State of Michigan, to contract for the construction of said military road, as from the record of said appointment on file in the office of the secretary of State of Michigan, to which reference is hereby made as a part of this bill, will more fully and particularly appear.

That on or about the 8th day of October, 1868, the said Ransom Sheldon, acting under said appointment from the said governor of the said State of Michigan, and in pursuance of said act of the Legislature of the State of Michigan, approved February fourth, 1864, entered into a contract, as such commissioner, with one Francis W. Anthony, which contract is dated the eighth day of October, in the year eighteen hundred and sixty-eight, by which said contract,
5 amongst other things the said commissioner agreed, on the part and behalf of said State of Michigan, that the said State of Michigan should grant unto the said Anthony, the lands conferred upon said State of Michigan by the said act of Congress, in pursuance of the contract, a copy of which said contract is hereto annexed, and marked "Schedule A," and to which contrabt, on file with the secretary of State of the State Michigan, for greater certainty and particularity, your orator prays leave to refer as a part of this bill.

That the said Francis W. Anthony afterwards, and in the year 1868, executed and filed with the secretary of State of the State of Michigan, the bond required by said contract, and the said contract thereby became and was of full force and binding effect between said Anthony and said State of Michigan.

Your orator further states that on or about the fifth day of December the said Francis W. Anthony and said Ransom Sheldon, as commissioner of the State of Michigan as aforesaid, entered into a contract supplemental to and in addition to that last mentioned, whereby it was agreed, amongst other things, that said Anthony should be entitled to apply for and receive the number of sections of land per mile, appropriated for that purpose by the said act, as soon as two consecutive miles of said road should be completed instead of ten miles, as in and by said original contract was provided, and that the board of control should have the power at any time to suspend the work under said contract, as in and by said supplemental contract of December 5, 1868, as by the record thereof in the office of the secretary of State of said State of Michigan, when proved, will more fully appear.

6 Your orator further shows that after said Anthony had secured the said contract to construct the said military road, as hereinbefore set forth, he took in as partners in said contract with himself William Harris and William W. Spalding in order to strengthen the financial ability of said Anthony, by said partnership, for the purposes of completing and constructing said military road, and that on or about the month of November, A. D. 1870, the said partners had fully constructed and completed about eighty miles of said military road, commencing at Fort Wilkins, Copper

Harbor, and entending southerly along the line marked out by said commissioners, as in and by said contract provided between said Ransom Sheldon, commissioner, and said defendant Anthony, as hereinbefore set forth; and in the construction of said road to the extent above provided the said firm of Anthony, Harris & Spaulding had exhausted their financial resources and credit, and were in debt to the amount of thirty thousand dollars and upwards, which debts were pressing them, and were entitled to receive from the State of Michigan, under the contract aforesaid, patents for about one hundred and fifty-three thousand acres of land, granted by the act of Congress to the said State of Michigan to aid in the construction of said military road.

That on or about the 25th day of August, 1870, thirty miles of said military road, commencing at Fort Wilkins and extending from thence southerly, had been inspected and accepted by the board of control of said State of Michigan, and said Anthony had received patents or title deeds, bearing date on the 25th day of August, 1870, for 47,958 and $\frac{85}{100}$ acres of said lands on account of said work,
7 and was entitled to have received in November of the same year from the said board patents or title deeds to the amount of one hundred and six thousand acres in addition thereto.

That the said firm of Anthony, Harris & Spaulding sent the said Francis W. Anthony to New York to raise money upon the credit of their said enterprise, in order to enable them to complete the same and realize the profits which they anticipated from the same; that after many fruitless endeavors to raise money upon the credit of said enterprise, and of the said Anthony, Harris & Spaulding, the said Anthony, in behalf of said firm, entered into a verbal arrangement with the directors, who were stockholders holding all the stock, and were also creditors of the Portage Lake and Lake Superior Ship Canal Company, who, acting in the behalf of the said last-named company, and of themselves as individuals, stockholders, and directors, agreed with said firm of Anthony, Harris & Spaulding upon the following plan to raise the necessary funds for completing said wagon road enterprise by the said Anthony, Harris & Spaulding, as well as for the completion of said ship canal, to wit:

First. That the said firm of Anthony, Harris and Spaulding should transfer all their rights under the said wagon road contract with the State of Michigan to Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, including forty-seven thousand odd acres of land, which had already been patented to said Anthony.

Second. That the said firm of Anthony, Harris & Spaulding, and the said directors of the Portage Lake corporation, should endeavor to procure legislation to authorize said canal company to
8 change its name, and be known as the Lake Superior Ship Canal Railroad and Iron Company, and to authorize it to receive subscriptions to stock in said corporation, payable in lands instead of money, at an agreed price for the lands between the said corporations and the subscribers to the stock.

Third. That the said directors of the Portage Lake Ship Canal

Company should, as indviduals, subscribe for the stock of the last-named corporation to the amount of two millions dollars, and pay said subscription by their warranty deed of two hundred thousand acres of said wagon road lands, the legal and equitable title to which they should be enabled to receive through the transfer of the contract rights aforesaid of the said Anthony, Harris & Spaulding.

Fourth. That upon said deed being made to the said Portage Lake Ship Canal corporation by the said directors, as individuals, the said corporation should issue its coupon bonds to the amount of three millions five hundred thousand dollars, to be placed upon the market to raise money for the said Portage Lake Canal enterprise and for the wagon road enterprise of said Anthony, Harris & Spaulding; said bonds to be secured by mortgage of the said Portage Lake Canal corporation to the Union Trust Company of New York in trust for the security of said last-named issue of bonds.

Your orator further says that the terms of said verbal arrangement herein last set forth were carried out as far as practicable, first, by the co-operation of said Anthony, Harris & Spaulding; the Averys, Wild, and Conant, jointly and severally, co-operating in procuring, and did procure, the necessary legislation to carry out the programme aforesaid, and the said corporation was accordingly reorganized under said proposed new name, and then the said Anthony, by
9 deed of said 47,958$\frac{85}{100}$ acres, of which he held the patents, & by contract, copy of which is hereto annexed, marked Schedule "B," under his hand and seal, assented to and approved by said Harris and Spaulding, transferred to said Averys, Wild and Conant the rights of the said firm of Anthony, Harris & Spaulding in the said wagon road contract and land grant, and then the said Averys, Wild and Conant made their subscription to the capital stock of the said corporation, and paid for the same by the execution and delivery of their warranty deed, copy of which is hereto annexed and marked Schedule "C," granting the said two hundred thousand acres of land of the said wagon road land grant to the said The Lake Superior Ship Canal Railroad and Iron Company, and the said last-named corporation issued their several coupon bonds to the amount of three millions five hundred thousand dollars, in bonds of one thousand dollars each, and placed the same in the hands of the Union Trust Company of New York, and executed and delivered their mortgage to said Union Trust Company upon all the property, rights, and franchises of said Ship Canal Company, including the said two hundred thousand acres of said wagon road land grant deeded to them as aforesaid, in trust to secure the payment of said three millions five hundred thousand dollars of said bonds and coupons, a copy of which mortgage & of the signatures & acknowlments thereof is hereto annexed & marked "Schedule C*a*;" and the said Union Trust Company of New York delivered to the said board of directors of the said Lake Superior Ship Canal Railroad and Iron Co., for its use, one million three hundred thousand dollars of said coupon bonds, certified in the usual form by the said trustee as secured by said mortgage.

And thereupon the said directors of the said Lake Superior Ship

Canal Railroad and Iron Company and the said Anthony,
10 Harris & Spaulding, upon the faith and credit of said bonds, raised in the open market thirty-six thousand dollars, which was paid over to the credit of Averys, Wild and Conant, with said Anthony, Harris & Spaulding, under the arrangement hereinbefore set forth between them; and subsequently, in June and July, sixteen thousand dollars more were raised in open market in the same manner, upon said bonds thus issued as aforesaid, and paid over to the said Anthony, Harris & Spaulding on account of the same contract with the Averys, Wild and Conant, as aforesaid; and the remainder of said one million three hundred thousand dollars of bonds were sold or pledged in the open market of New York and elsewhere, and money raised thereupon and applied to the use and benefit of said Lake Superior Ship Canal Railroad and Iron Company.

II.

Your orator further shows that prior to the making of the mortgage hereinbefore set forth to the Union Trust Company of New York, the said Portage Lake and Lake Superior Ship Canal Company had mortgaged its first congressional land grand of two hundred thousand acres to Columbus C. Douglass, of Houghton, Michigan, in trust, to secure five hundred thousand dollars of its first mortgage bonds secured on said first land grant, on bonds of five hundred dollars each, with coupons attached; and such proceedings were had subsequently that the said Columbus C. Douglass, trustee, was displaced from his trusteeship and D. Randolph Martin, of the city of New York, was substituted as trustee in his place; and subsequent to the last appointment the said D. Randolph
11 Martin resigned his trusteeship, and John L. Sutherland, of the city of New York, was substituted as trustee in his place.

And your orator further shows that the said Portage Lake and Lake Superior Ship Canal Company mortgaged its first and second land grant to Thomas T. Davis, of Syracuse, N. Y., and D. Randolph Martin, of the city of New York, in trust, to secure five hundred thousand dollars of a second issue of bonds by said Portage Lake Canal Company, in coupon bonds of five hundred dollars each, and such proceedings were thereafter had that Lucien Birdseye, of the city of New York, was substituted as trustee in place of D. Randolph Martin and Thomas T. Davis.

Your orator further shows that the said Portage Lake and Lake Superior Ship Canal Company made a third mortgage to Charles L. Frost, of the city of New York, to secure one thousand two hundred and fifty bonds of one thousand dollars each, and as security therefor mortgaged its two land grants and canal, subject to the two mortgages last hereinbefore recited; that all of the bonds of the last-named three issues, except two hundred and fifty bonds of the last issue, had been issued and placed upon the market, and pledged with different holders for advances, at the rate of about fifty per cent. of the face value thereof, at the time when the Union Trust Company mortgage, as hereinbefore specified, was made and the

bonds under it placed upon the market, and subsequently such proceedings were had that Thomas N. McCarter was substituted as trustee in the said third mortgage in place of said Charles L. Frost.

12 III.

That on the 25th day of May, A. D. 1872, a bill was filed in the United States circuit court of the sixth district, sitting in the eastern district of Michigan, by the said John L. Sutherland, trustee, against the Lake Superior Ship Canal Railroad and Iron Company and others, wherein Alfred Russell, of the city of Detroit, was solicitor for the complainants, for the foreclosure of the said mortgage upon the lands conferred by the first Congressional land grant hereinbefore set forth; and on the third day of July, A. D. 1872, a bill was filed in the name of the said Thomas N. McCarter, trustee, in the same court, by Alfred Russell, his solicitor, to foreclose the said mortgage which had been given to said Charles L. Frost by the said Portage Lake and Lake Superior Ship Canal Company as aforesaid; and on the fifth day of July, 1872, in the same court as last aforesaid, a bill was filed by the same solicitor in the name of Lucien Birdseye, trustee, to foreclose the mortgage given by the said Ship Canal Co. upon its first and second congressional land grant hereinbefore set forth; and on the 19th day of June, 1875, a bill of foreclosure was filed by the same solicitor, in the same court, in the name of the Union Trust Company of New York, to foreclose the mortgage given to it by the said Portage Lake Canal Co. hereinbefore mentioned. And such proceedings were had that afterwards, in the first named foreclosure suit in the name of Sutherland, trustee, herein last-mentioned, the bill on such foreclosure was amended by adding as defendants thereto George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal Railroad

13 and Iron Company, who had, since the commencement of said suit, been appointed assignee in bankruptcy of said last-named corporation, which had been declared bankrupt on the 27th day of August, 1872. And afterwards the said George Jerome and Fernando C. Beaman, assignees in bankruptcy, to wit, on the 13th day of September, A. D. 1873, filed their cross-bill in the same court as last aforesaid to the said bill of the said Sutherland, trustee as aforesaid, so filed as aforesaid; to which said several bills and cross-bills, for greater certainty and particularity as to the proceedings and the defendants therein, your orator prays leave to refer, as they appear by the files of the said circuit court in chancery.

And afterwards, to wit, on the 12th day of February, in the year 1877, an order was made in the said court upon the application of Meddaugh & Driggs, the solicitors for said Jerome and Beaman, assignees as aforesaid, that their said cross-bill to the Sutherland bill be held and considered as a cross-bill to all the said foreclosure cases hereinbefore set forth, and that the proofs taken in each of said cases be considered as taken in each and all of them, and that the said causes be all brought on to be heard as one cause. And afterwards, to wit, the 13th day of March, in the year A. D. 1877, the said causes were

brought on for hearing, and decree made therein, a copy of which decree is hereto annexed and marked as Schedule "D." And afterwards, to wit, in June or July of that year, a sale of the entire property so decreed to be sold under said decree was made by the master appointed therein to Albon P. Man and Nathaniel Wilson, who were members of the syndicate hereinafter shown, and the title thus acquired was held for the benefit and under the control
14 of said syndicate, and a report of such sale was duly made and filed by the said master in the said circuit court; which said sale was subsequently confirmed in due course of practice in said court; and soon thereafter the said Nathaniel Wilson and Albon P. Man released to the late James C. Ayer, hereinbefore mentioned and now deceased, the right to or equity of redemption in the residue of the said two hundred thousand acres of the said wagon-road lands which they had purchased at said master's sale, as appears by said master's report, the legal title to which said residue of lands had long prior to said release been acquired by said James C. Ayer, said legal title being chargeable in equity, nevertheless, with a trust for the payment of the amount remaining unpaid upon the 1,300 bonds secured by said mortgage to the Union Trust Company aforesaid, by whomsoever held, in good faith, by reason of the circumstances hereinafter set forth and shown; and the other property so sold as aforesaid on said decree was subsequently disposed of by said Man and Wilson, under the direction of said syndicate, to a corporation organized to receive and hold the same in the interest of said syndicate, and the same is now so held and owned by said syndicate.

IV.

Your orator further states and shows that he is the holder as purchaser in good faith of two hundred and thirty of the aforesaid issue of 1,300 bonds of $1,000 each, secured by said mortgage to the aforesaid Union Trust Company of New York, with the interest coupons therein from the date of their issue as aforesaid, a sample
15 copy of which said bond is hereto annexed with sample copy of the first-due coupon thereof, and marked Schedule "E;" and that the sum of nine dollars was paid to your orator by said master's sale aforesaid upon each of said bonds, which is the only payment of principal or interest which has ever been made upon said bonds or upon any of said last-named issue.

Your orator further states and shows that in the year 1871 all enterprises in the northwest which required the obtaining of credit in New York to insure their completion were brought to a stop by reason of the disaster of the great fire in Chicago, which occurred in October of that year, and as a consequence thereof the aforesaid ship canal enterprise and the dependent enterprise of completing the wagon road under the assignment of the contract aforesaid were brought to a stand still, requiring new combinations and efforts to bring the real value of the securities furnished by the Government for their completion to the attention and knowledge of capitalists, which was all that was necessary to be done to ensure their success-

ful prosecution and completion, as it was a matter of fact that the lands pledged to that end were a good security for more than ten times the value of the money required for that purpose, which real value of said lands and the situation and condition of said securities as hereinbefore shown were well known to the said James C. Ayer, now deceased, and to the other individuals who formed the syndicate hereinafter more particularly set forth.

Your orator further shows and states that the said Anthony, Harris & Spaulding acted in accord and co-operation with said Averys, Wild & Conant, and with the board of directors of said Ship Canal Company, while the latter were presenting the merits of both
16 enterprises, as well that of the Ship Canal Company as the wagon enterprise, to the attention of capitalists in Europe and the United States, with a view of placing the bonds of the Ship Canal Company aforesaid sufficient to secure & perfect the title to said wagon road lands & secure the completion of both the enterprises aforesaid, which negotiations were on the eve of a successful issue when they were interrupted and defeated by the said James C. Ayer, deceased, and the syndicate of which he became a member as hereinafter stated.

Your orator further shows and states that up to the first day of December, 1871, the said Averys, Wild & Conant and said Ship Canal Co. had their office and headquarters in the city of New York, over the office of the Ocean National Bank, in Broadway; and they had procured large credits at said Ocean National Bank, on pledge of the bonds of the three first-named issues of bonds of said Ship Canal Company, and by pledge of the said Union Trust Co. bonds; and by reason of said extensive credits to said Averys, Wild & Conant, and said Ship Canal Company, and of other large credits to said Averys, Wild, and Conant, made upon pledge of other bonds of other enterprises, the said Ocean National Bank became embarassed, and on the 12th day of December, A. D. 1871, the said Ocean National Bank suspended payment, and on the day last aforesaid one Theodore M. Davis, of the city of New York, procured himself to be appointed receiver of said bank, under the provisions of the general national banking law in such case provided.

Your orator futher shows that said Theodore M. Davis, soon after his appointment as receiver as aforesaid, and well knowing
17 the great value of said ship canal, and of the said six hundred thousand acres of land, covered by the said mortgages, as security for the aforesaid four issues of bonds of said Ship Canal Company; and also, with full knowledge of the situation of affairs hereinbefore stated, as existing at the time of his appointment as receiver, conceived the design of wrecking the credit of the said Ship Canal Co., and of obtaining its bonds and property at great sacrifice, for the benefit of a syndicate to be formed by combination of large creditors holding its various issues of bonds in pledge, to the exclusion of the bondholders outside of such syndicate, by sacrifice of the property of said corporation, and its absorption by the said syndicate.

Your orator further shows that at the time said Davis was ap-

pointed receiver as before stated and for some weeks thereafter, the said directors of said Ship Canal Company were negotiating with said James C. Ayer, now deceased, and with other capitalists, to whom said Ayer had introduced them, for sufficient capital to bring their canal enterprise and their said wagon road enterprise to a successful conclusion, when said James C. Ayer was approached by said Davis with a proposition to enter into his said proposed syndicate, whereupon the said James C. Ayer abandoned his negotiations with said directors, and entered into the syndicate proposed by said Davis, with a view to the wrecking both the wagon road and canal enterprises, as aforesaid, for the benefit of said syndicate.

Your orator further shows and states that in February or March of the year 1872, the said syndicate was made up by said Davis and James C. Ayer, and their associates, and their articles of association to the end aforesaid were reduced to writing, and signed by the parties thereto. That at this time the said Davis, as receiver, as aforesaid, held of the bonds which had been hypothecated in pledge to said Ocean National Bank for debts of said Ship Canal Company to said bank, 238 of the Douglass mortgage bonds, 136 of the Birdseye bonds, 262 of the Frost mortgage bonds, and 274 of the Union Trust mortgage bonds theretofore issued by said Ship Canal Company, as hereinbefore stated, which had been pledged to said Ocean National Bank as security for debt of said Ship Canal Company on loans of about fifty per cent. of the amount of said bonds. And J. Boorman, Johnston & Co., a mercantile firm of said city of New York, then held as collateral to loans to said Ship Canal Company 200 of the aforesaid issue of Birdseye bonds as security for debts of said Ship Canal Company, of about 80 per cent. of the amount of said bonds; and the firm of James C. Ayer & Co., of which firm said James C. Ayer was the head and principal proprietor, held 354 of said Douglass mortgage bonds, 138 of said Birdseye bonds, and 268 of said Frost mortgage bonds, as collateral and on pledge for the security of debts of said Ship Canal Company of about 50 per cent. of the amount of said bonds.

That said syndicate then agreed to pool their bonds and debts aforesaid for the common interest of said syndicate and to run down the value of said bonds upon the market and to wreck the enterprise aforesaid.

And first, by manipulations between themselves to depreciate the value of said bonds, and to proceed to foreclose the pledges aforesaid, and among themselves to procure to the syndicate the legal title to said bonds so pledged as aforesaid, so that the ostensible legal title to the said bonds held by the several members of said syndicate should be attained by due form of legal proceedings each for the other bidding off the bonds aforesaid on apparently legal sales thereof, by each member of the said syndicate, wherein other apparently disconnected members of the syndicate should, at public sale duly advertised, bid off said bonds, and become legal owners of said pledged bonds in the interest of said syndicate; and in accordance with such plan the legal title to the whole of said pledged bonds was procured at a mere fraction of their face value,

in due form of law, and the same having been procured as aforesaid were held by the different members of said syndicate for the common benefit anterior to the 25th day of May, A. D. 1872.

And your orator further shows and states that the said syndicate having procured the legal title to said bonds, as last above stated, agreed among themselves to employ Alfred Russell, an eminent lawyer of the city of Detroit, to carry out the designs of said syndicate and for the purpose of foreclosing the said mortgages in the interest of the said syndicate; and to the end last aforesaid the said syndicate procured a change of the trustee in the said Douglass mortgage, substituting said John L. Sutherland as trustee, to the end and with the intent that said Sutherland, trustee, should employ the said Russell to foreclose said Douglass mortgage in the interest of the said syndicate: and said Sutherland, trustee, employed said Russell accordingly, with the understanding that his services were to be paid for by said syndicate; and said Russell, as the solicitor of said syndicate, commenced foreclosure of said Douglass mortgage in the name of said Sutherland, as hereinbefore stated, on the 25th day of May, A. D. 1872.

20 And afterwards said syndicate procured the said Lucien Birdseye, who had been substituted as trustee in the said second mortgage in place of said Thomas T. Davis and D. Randolph Martin, to employ said Russell to foreclose the said second mortgage in the interest of said syndicate; and upon said Birdseye at first refusing so to do the said syndicate gave bonds to said Birdseye to indemnify him against loss or damage in so doing; and upon receiving said bonds the said Birdseye consented to employ said Russell to foreclose said second mortgage, as requested by said syndicate, and he accordingly employed said Russell to foreclose said mortgage on the retainer of said syndicate, who were to pay said Russell for his services therein, and who thereupon and upon such retainer, and in the interest of said syndicate commenced said foreclosure of said Birdseye mortgage, as hereinbefore stated, on the 5th day of July, A. D. 1872.

Your orator further states and shows that at the same time last aforesaid said syndicate had procured said Charles L. Frost, the trustee in the said third mortgage, to resign his trust, and had procured Thomas N. McCarter of New Jersey, to be appointed in the place of said Frost as trustee, to the end that said McCarter should allow the said Alfred Russell to use his name as trustee on the retainer of said syndicate to foreclose the said Frost mortgage in the interest of the said syndicate; and said McCarter after being so substituted employed said Russell accordingly, and the said Russell, in pursuance of such employment, on the 3rd day of July, A. D. 1872, filed the bill in that behalf hereinbefore set forth.

Your orator further shows and states that before the commencement of the said three foreclosure suits, as hereinbefore stated,

21 the negotiations of the said directors of the said Ship Canal Company, concurred in as aforesaid by said Anthony, Harris & Spaulding as aforesaid, had reached a point where a successful conclusion was assured on the basis of satisfactory title of said six

hundred thousand acres of land being found to be in the said Ship Canal Company, and on the value of said property being verified as represented by report of agents for that purpose, who had been duly delegated by foreign capitalists to investigate to that end, of which promised success the said syndicate having been advised, they, the members of said syndicate, set themselves about thwarting the success of said negotiations, and accomplished their purpose in the manner following, to wit:

The said James C. Ayer and the other members of the said syndicate being advised as aforesaid of the promised success of the negotiations of said Averys, Wild, and Conant, in behalf of said Ship Canal Co., met together in New York city, A. D. 1872, and after discussing the situation they concluded and agreed that the said James C. Ayer should proceed to procure the title held by the State of Michigan to the residue of the wagon road lands, which had not been patented to said Anthony, for the sole and exclusive benefit of the said James C. Ayer, in consideration that said Ayer should advance sufficient money to buy over said Anthony, Harris, and Spaulding from their allegiance to said Ship Canal Company under their said contract with said Averys, Wild, and Conant, and sufficient to complete said Anthony's contract with the State of Michigan, so assigned to said Averys, Wild, and Conant as aforesaid; and having so agreed the said syndicate immediately sent for their said solicitor at Detroit to meet said syndicate in New York city
22 in conference for the purposes last aforesaid, and said Russell, on receiving the message aforesaid, hastened to New York and met said syndicate in consultation, and after being advised of the situation and the perils and hopes of the syndicate in the premises, advised said syndicate to send a dispatch to Mr. L. Seager, of Lansing, Michigan, whom said Russell advised said syndicate was a man of responsibility, capital, and influence, and safe to be trusted to carry out the said designs of said syndicate in that behalf as contemplated.

Whereupon said Seager was sent for by telegraph, and having arrived at said meeting of said syndicate and their solicitor as aforesaid, was enlisted by said syndicate in its said designs, and being so enlisted the said James C. Ayer agreed with him to indemnify him from all cost, charges, and expenses which he might incur in getting the legal title to said residue of said wagon road lands, first into the name or names of said Seager and friends, and thereafter to be transferred to the said James C. Ayer for his sole benefit in pursuance of the scheme last aforesaid.

Whereupon the said Seager immediately returned to Michigan and put himself in communication with said Anthony, Harris & Spaulding, and on representations to them that their reliance upon said Averys, Wild, and *and* Conant, and said Ship Canal Company and their negotiations was a forlorn hope, without prospect of success, and on promises of aid in completing said wagon road contract, and in consideration of a bonus of $20,000 or thereabouts, for breaking off with said Averys, Wild, and Conant, said Seager induced said Anthony, Harris & Spaulding to abandon their connec-

tion with said ship canal enterprise, and to finish the work
23 under said wagon road contract under the auspices and by means of the pecuniary aid to be furnished by said Seager.

And, thereupon, said Seager and Anthony, Harris & Spaulding proceeded accordingly, and finished up the said contract with the State of Michigan, and procured title from said State of Michigan to 173,000 acres of said wagon road lands, which title was subsequently transferred to said James C. Ayer, and was thus apparently cut out from under the lien of the said mortgage of the said Ship Canal Company, which said last-named deeds of said residue of said wagon road lands, were made and delivered as follows, to wit:

One deed of 95,965 and 91-100 acres of said land was first made to one Angus Smith, a friend of said Seager, who deeded the same according to the programme aforesaid, to said James C. Ayer, in the year 1873. One deed directly from the State of Michigan to the said James C. Ayer, of 57,921 $\frac{11}{100}$ acres of said land, on November 10th, 1873. And another deed directly from said State of Michigan, to the said James C. Ayer, of 19,175 $\frac{48}{100}$ acres of said land, on July 13, 1875.

Your orator further shows and states that the said defection of said Anthony, Harris & Spaulding, from their allegiance to their obligations under their arrangements with said Ship Canal Company and its directors last aforesaid, was, as soon as it was assured by said syndicate, published broadcast over the country, and resulted, as was intended by said syndicate, in thwarting the then pending negiotations for money, which had been inaugurated by the said Ship Canal Company and its directors as aforesaid, and assured the success of the said plans of the said syndicate; and then the said syndicate, with intent to assure the said legal title to
24 the residue of said wagon road lands to James C. Ayer according to the agreement among themselves as aforesaid, enlisted the said, The Union Trust Company of York in their said designs, and procured the said Union Trust Company as trustee in the said fourth mortgage of said Ship Canal Company, to allow the said Alfred Russell, the solicitor of the said syndicate, upon the retainer of the said syndicate to foreclose the said Union Trust mortgage in the interest of the said syndicate, but with the understanding that such foreclosure should be conducted in pursuance of the said agreement of the said syndicate, with said James C. Ayer for the protection of the aforesaid legal title to the said residue of said wagon road lands in the said James C. Ayer, as far as practicable and possible under the decree to be attained therein. And the said Alfred Russell, upon the said retainer of the said syndicate, did file the bill to foreclose the said Union Trust Company mortgage as hereinbefore stated, on the 19th day of June, A. D. 1875, in the circuit court aforesaid, using the name of said Union Trust Company and controlling said suit of foreclosure and the decree therein in collusion with the said syndicate, and in furtherance of its designs aforesaid; and said Russell was paid by said syndicate to act for said syndicate in its interest in carrying out the said designs, and neither received nor demanded any compensation for his services from said Union Trust

Company; and thus the legal title aforesaid, to the residue of said wagon road lands, in pursuance of the said designs of said syndicate, was excluded from being brought in question in the said bill of complaint so filed by the said Russell, and was protected as far as possible by the decree entered on said foreclosure in pursuance
25 with the said designs and agreemeents of the said syndicate, in violation of the duty of said Union Trust Company to attain said legal title and have the same applied to the benefit of the bondholders, under the said Union Trust Company mortgage aforesaid, which said bonds your orator represents as aforesaid.

And your orator avers that the said Union Trust Company of New York, trustee as aforesaid, is still in collusion with the members of said syndicate who are living, and with the representatives of those who are deceased so that it is an unfit representative of the trust under said mortgage to bring this suit, wherefore your orator, in behalf of himself and of all others like situated and interested, is compelled to bring, and does bring, this suit in behalf of the said *cestui's que trustent* whose interests can thus only be duly protected, attained, and conserved.

Your orator further shows and states that the said decree, Schedule "D," of this bill was not, in fact, an adjudication of the said court upon consideration of the pleadings and proofs in the said several causes which as appears by said decree were heard and decided together, but was, in fact, a decree drawn by the said Alfred Russell, solicitor of the syndicate aforesaid, and submitted to by compulsion by those representing collateral interests therein, and assented to by the Union Trust Company of New York aforesaid in collusion with the syndicate aforesaid through their solicitor aforesaid, and by the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of said Ship Canal Company aforesaid, through ignorance of the rights and equities of the said last-mentioned corporation against the legal title of the said James C. Ayer to the said residue of the said wagon road lands beyond the 47,000 and odd acres which
26 were actually sold under said decree; and said Jerome and Beaman were actually misled as to the lien of the said Union Trust mortgage upon said residue of said wagon road lands by the collusion, neglect, and failure of the said Union Trust Company, in its foreclosure bill aforesaid, to make said James C. Ayers a party defendant, charging the legal title to said lands in his hands with a trust for the payment of said mortgage, and by the collusive concession in said foreclosure bill that the title to said residue of said wagon road lands had been lost to the said Ship Canal Company and taken out from under the lien of said mortgage by reason of a grant thereof to third parties by the State of Michigan whereby the lien of said mortgage had been lost, and hence the said Jerome and Beaman seeing no interest which they could conserve by opposing said decree as drawn, and insisted on by said Russell, consented to said decree as proposed by said Russell, and said decree was entered accordingly by consent as aforesaid, and so it was represented to the judge who allowed the same to be entered without opposition or argument or consideration, and it was signed accordingly.

Your orator further shows that in the year 1878 the said James C. Ayer, deceased, his residence being then at Lowell, Massachusetts, and he left him surviving his widow, Josephine Ayer, who now resides in the city of New York, and is a citizen of the State of New York, also Frederick F. Ayer, his son, who resides in Boston, in the State of Massachusetts, also Leslie Josephine Ayer, his daughter, who resides in New York City, and Henry Ayer, another son, who resides in said city of New York. That the foregoing are the only heirs and the widow of said James C. Ayer,
27 and they hold the title to said residue of said wagon-road lands hereinbefore set forth as deeded to said James C. Ayer at the time of filing this bill by inheritance from the said James C. Ayer. Your orator further shows that Frederick F. Ayer, the said son of James C. Ayer, deceased, and Benjamin Dean, who is a citizen of the State of Massachusetts, residing in Boston, in said State, and Jacob Rogers, who is a citizen of the State of Massachu tts, residing in Lowell, in said State, have or claim as trustees, und r the will of said James C. Ayer, deceased, or otherwise, as volunteers to have and hold the legal title to said residue of said wagon-road lands, so deeded, as hereinbefore stated, to said James C. Ayer in his lifetime. And your orator prays that the said three parties last named, and each and every of them, be made parties defendant to this suit, to the end that whatever title they hold or claim to the lands aforesaid, in trust or otherwise, may be subjected to the decree hereinafter prayed.

Wherefore, in consideration of the premises, your orator prays that the said widow, Josephine Ayer, and the daughter, Leslie Josephine Ayer, and the said two sons, Frederick F. Ayer and Henry Ayer, and the said Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, trustees under the will of said James C. Ayer, deceased, and the said George Jerome and Andrew C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal Railroad and Iron Company, and the said The Union Trust Company of New York, defendants hereto, may answer this bill without oath, an answer under oath being hereby waived, and that your orator may be allowed by this court to have the benefit of said decree herein
28 set forth as "Schedule D," hereto, in behalf of your orator, and any other holders of said 1,300 bonds secured by the said mortgage to the said Union Trust Company of New York, who are *bona fide* holders of said bonds in said decree mentioned, and that in behalf of your orator and said bondholders the said residue of 200,000 acres of wagon-road lands so deeded to said Jas. C. Ayer in his lifetime, as heretofore stated, may be by the decree of this court charged in the hands of said widow and heirs, or of said trustees, with a trust for the payment of the unpaid portion of said 1,300 bonds and interest thereon, and that the said residue of said land be sold under the decree and direction of this court to pay the moneys remaining due upon said unpaid bonds, or so much thereof as shall be necessary to that end; subject, however, to the lien of the said widow and heirs, or of said trustees under the will of the said James C. Ayer, for all money advanced by said James C. Ayer in completion

of said wagon-road land contract, as the same shall be ascertained upon an accounting of the same, with interest, as the same shall appear upon an accounting thereof. And that it be referred to one of the masters of this court to take an accounting thereof, and of the moneys due or to become due upon said unpaid bonds, and report the same to this court; and that upon the coming in of such report the usual order of sale of said lands on foreclosure be decreed in this cause, or that the said residue of said wagon-road lands be charged by the decree of this court, in addition to the amount of principal and interest due upon said bonds and coupons, with the amount expended by said James C. Ayer in procuring the legal title of the State of Michigan, with interest thereon, as that amount shall be ascertained and reported by such master; and that on payment of such amount of principal and interest to the defendants, who now hold said legal title (which sum your orator is ready and willing, and hereby offers, to pay as this court shall direct), the said last-named defendants be decreed and directed to convey said lands to a receiver to be appointed by this court, to be sold under the direction of a master thereof, to satisfy both said sums so to be charged thereon as herein prayed.

And that your orator may have the usual process of subpœna issuing out of and under the seal of this court, directed to the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said The Lake Superior Ship Canal Railroad and Iron Company, and the said The Union Trust Company of New York, and to the said Frederick F. Ayer, Henry Ayer, Josephine Ayer, and Leslie Josephine Ayer and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, trustees under the will of said James C. Ayer, deceased, commanding them on a certain day to appear in this court and answer this bill and abide the decree to be entered herein; or that your orator may have such other or further relief in the premises as to the court shall seem meet.

And your orator will ever pray, &c.

MORRIS RICHTER.

J. P. WHITTEMORE,
Solicitor and of Counsel for Plaintiff.

29 "SCHEDULE A."

"Whereas the Governor of the State of Michigan did appoint Ransom Sheldon the commissioner by virtue of an act of the Legislature of the State of Michigan, passed February 4, A. D. 1864, entitled 'An act to accept the grant of said lands made to the State of Michigan by the United States to aid in the construction of a military road,' etc.

"And whereas Francis W. Anthony, of Rockland, Ontonagon county, in the State of Michigan, has offered and proposed to build said road from Fort Wilkins, near Copper Harbor, in Keweenaw county via Eagle river, in said county, Houghton, in Houghton county, Rockland, in Ontonagon county, and southerly to the State line on the route or line as surveyed and approved by the commis-

sioners, John Senter and John H. Foster, according to the maps filed in the State office at Lansing and in the clerk's office of the respective counties, and to complete the same on or before the expiration of the life of the grant, as extended by act of Congress in accordance in all respects with the report of the commissioners now on file in the office of the secretary of State of Michigan, submitted and accepted by said board in pursuance of the requirements of the laws of Congress and the said laws of the State of Michigan. It is therefore agreed by and between the said Ransom Sheldon, commissioner aforesaid, and the said Anthony as follows, to wit:

30 "First. The bid or proposal of said Anthony is accepted, and it is agreed that the contract for the construction of said road shall be awarded to him, and the same is hereby awarded to said Anthony.

"Second. The only consideration to be paid to said Anthony is the land granted by Congress, in aid of the same, to the State of Michigan, and all the benefits, emoluments, rights, and interests arising from said grant are hereby conveyed and assigned to said Anthony to the full extent of the power of said commissioner to do the same, to have and to hold to him, the said Francis W. Anthony, his heirs and assigns forever.

"Third. The said Francis W. Anthony, in consideration of the premises, covenants and agrees to build and completely construct said road in all respects as required by the report aforesaid of said commissioners, and to this end said report now on file in the office of the secretary of State, executed by John Senter and John H. Foster, under date of October 7th, A. D. 1868, laying out and establishing said road, is referred to and made a part of this agreement.

"That said specifications therein set forth, in all respects shall be as binding as though the same was engrossed herein.

"It is also further agreed by said Ransom Sheldon, commissioner aforesaid, that where the line of said military road is now, or may hereafter be located by the proper authority, over and along the line and route of any public highway, constructed in whole or in part by any individual corporation, town, or county through

31 which said road may run, said Anthony shall have the benefit of all work done on such highway without making any compensation therefor.

"And it is further agreed that should Congress or the State of Michigan grant any further aid for the construction of said military road the same shall inure to the benefit of said Francis W. Anthony, his heirs or assigns, in proportion, from time to time, as he construct and complete each ten-mile section of said road.

"And it is further agreed by said Sheldon, commissioner aforesaid, that any laws or acts of the Legislature of Michigan that may pass hereafter before the completion of said road in reducing the width of road-bed, &c., from what is contemplated in this contract, shall inure to the benefit of said Anthony and become a part of this contract.

"And it is further agreed that as soon as any continuous ten miles of said road is completed said Francis W. Anthony, his heirs or

assigns, shall be entitled to apply for and receive a certificate for the number of sections of land granted to aid in the construction of ten continuous miles of said military road.

"It is also agreed that the said Anthony shall have the first thirty sections of land authorized to be sold by the act of Congress making the grant of land to aid in the construction of said military road, and for these first thirty sections said Anthony agrees to pay all the costs and expenses intended to be provided for by the proceeds of the sale of said first thirty sections of land.

32 "To insure the faithful completion of said military road in the manner contemplated herein the said Francis W. Anthony shall, before commencing the work, execute a bond in the penal sum of ten thousand dollars, with two or more sureties, to be approved by the board of control of the State of Michigan, conditioned for the faithful completion of the whole line of said military road from Fort Wilkin, near Copper Harbor, Keweenaw county, to the Wisconsin State line.

"This agreement is made subject to the approval of the board of control, and shall take effect and be in force when approved by said board of control and the bond of said Anthony, hereinbefore mentioned, shall have been filed and approved."

33 SCHEDULE B.

"Articles of agreement made and entered into this 20th day of April, A. D. 1871, by and between Francis W. Anthony, of Rockland, Ontonagon Co., Michigan, party of the first part, and Perez J. Avery, of the city of New York, Alfred Wild, of Rhinebeck, N. Y., J. Edwin Conart, of Union county, New Jersey, and William L. Avery, of the city of New York, parties of the second part, witnesseth: That whereas said Anthony, party of the first part, is the contractor to build a military road from Fort Wilkins, near Cooper harbor, in Keweenaw county, *via.* Eagle river, in said county; Houghton, in Houghton county; Rockland, in Ontonagon county; and southerly to the State line of the State of Michigan, under a contract made with the State of Michigan, by Ransom Sheldon, commissioner appointed by the Governor of Michigan, which said contract is hereto annexed and made a part of this agreement. And whereas said Anthony, party of the first part, has partially fulfilled said contract on his part, and has constructed eighty (80) miles of said road to the acceptance of said commissioner, and has received in consideration of such partial fulfilment of said contract the deeds or title papers of forty-seven thousand nine hundred and fifty-eight $\frac{83}{100}$ acres of land, and is entitled to receive title deeds or title papers to about ninety-six thousand acres of land in consideration of the work upon said contract already performed by him to the acceptance of the said commissioner, and upon the completion of said contract to build said road, said Anthony, said party of the first part, will be entitled to receive from the State of Michigan

34 one hundred and sixteen thousand and forty-two acres more of land, making in all two hundred and sixty thousand acres more of land.

"And whereas the said party of the first part, Francis W. Anthony, has agreed to sell, and does hereby sell, to the said parties of the second part all of the lands now deeded, or hereafter to be deeded, in pursuance of the work done under said contract, at the price of seventy-five cents per acre; and the said party of the second part, the said Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, have agreed to buy said land at said price of seventy-five cents per acre, to be paid for as follows:

"Thirty-six thousand ($36,000) dollars within thirty days from this date.

"Eight thousand ($8,000) dollars by the fifth day of June.

"Eight thousand ($8,000) dollars by the fifth day of July.

"Eight thousand ($8,000) dollars by the fifth day of August.

"Eight thousand ($8,000) dollars by the fifth day of September.

"Eight thousand ($8,000) dollars by the fifth day of October.

"Eight thousand ($8,000) dollars by the fifth day of November; all in the year 1871, and the balance in three payments; one of one quarter of the whole amount, in six months, from November first, 1871; and one of like amount, payable on the first of Nov., 1872; and the other of one-half the whole amount, payable on the first day of November, 1873; the last three payments to be secured by the joint and several notes of the parties of the second part,
35 with the bonds of the Lake Superior Ship Canal Railroad and Iron Company, at sixty per cent., assigned as collateral to said notes.

"Now, therefore, the said Francis W. Anthony, party of the first part, for and in consideration of the premises, and one dollar to him in hand paid, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell, assign, transfer, and set over unto the said parties of the second part, the said Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, the said contract to build said road hereunto annexed, with all the rights, privileges, powers, and claims arising from the same, and hereby covenants and agrees that he will, simultaneously with the payment of said thirty-six thousand (36,000) dollars by said parties of the second part, execute, make, and deliver to the said party of the second part, or to any person or persons they may suggest, a good and sufficient deed, conveying to the said parties of the second part, or to the parties or persons so suggested by them, all the lands now conveyed to said Francis W. Anthony, party of the first part. And the said Francis W. Anthony further covenants and agrees to execute, make, and deliver to the said parties of the second part, or to any person or persons they may suggest, a good and sufficient deed, conveying to them all of said lands to which he has become entitled by the work already done under said contract as soon as he shall obtain title for the same, amounting, with the lands for which patents have already been issued to him, to one hundred and fifty thousand acres, more or less.

36 "And said Francis W. Anthony, party of the first part, further covenants and agrees, to and with the second part, that he will push the work of building said road under said con-

tract forward with all diligence and dispatch, and will, upon the completion of each consecutive section of said road, convey to said parties of the second part, by good and sufficient deeds of conveyance, all the said balance of said lands under said contract as fast as he may become entitled to and obtain patents for the same by the progress of his said work, until all of said lands, amounting to two hundred and sixty thousand acres, more or less, are conveyed to said parties of the second part.

"And said parties of the second part hereby covenant and agree, to and with said party of the first part, said Francis W. Anthony, that they will pay him the said sum of thirty-six thousand ($36,000) dollars, within thirty days from this date, upon the making and delivery of said deeds of conveyance of all of said lands which have already been conveyed or patented to him, and that they will well and truly make the several payments of eight thousand ($8,000) dollars each on the fifth days of June, July, August, September, October, and November, as above specified, and, upon execution and delivery of the deeds for one hundred and sixty thousand acres of the lands, more or less, now already earned by the said Francis W. Anthony, the said Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery shall and will assign and deliver to said Anthony seventy-two thousand ($72,000) dollars at par of the bonds of the Lake Superior Ship Canal Railroad and Iron Company, to be held by
37 him as collateral security for the six monthly payments of eight thousand ($8,000) dollars each, twelve thousand of which bonds are to be returned by said Anthony upon the making of each monthly payment, and that upon the execution and delivery of deeds of conveyance as aforesaid, conveying the balance of said two hundred and sixty thousand acres of said land to said parties of the second part by said Anthony, said parties of the second part execute and deliver to him, said Anthony, their notes payable as above stated to the order of Francis W. Anthony, Wm. Harris, and Wm. H. Spalding for a sum sufficient, with the payments made as above stated, to pay for all of said lands so needed at the rate of seventy-five cents per acre, and will deliver to said party of the first part as collateral security for the payment of said notes Lake Superior Ship Canal Railroad and Iron Company bonds sufficient at sixty per cent. to cover said notes. And it is expressly agreed that upon the said Anthony conveying to said parties of the second part, or to any party or person by their direction, a sufficient quantity of said balance of said lands to equal by estimation of the price aforesaid the amount of the first note to be given by the parties of the second part for the balance of said lands as hereinbefore mentioned, the parties of the second part shall execute and deliver to the party of the first part the said note, and deliver therewith a sufficient amount of said bonds, at sixty per cent. on their par value, to cover the amount of said note as collateral, and when sufficient of said lands shall have been conveyed by said Anthony to equal at the price aforesaid the amount of the second of said notes, the parties of the second
38 part shall make and deliver said notes to said Anthony, or to such party as he shall appoint, and deliver therewith suffi-

cient of said bonds at sixty per cent. of their par value to cover the amount of said notes as collateral.

"In witness whereof the said parties to this agreement have hereunto set their hands and affixed their seals, this 25th day of April, A. D. 1871.

"F. W. ANTHONY. [L. S.]
"P. J. AVERY. [L. S.]
"ALFRED WILD. [L. S.]
"J. EDWIN CONANT. [L. S.]
"WM. L. AVERY. [L. S.]

"In presence of—
"EDWARD A. PIERCE."

39 SCHEDULE C.

[U. S. Rev. Stamp, $50.00, cancelled.]

This indenture, made the first day of May, in the year of our Lord one thousand eight hundred and seventy-one, by and between Perez J. Avery and Almira Avery, his wife, of the city, county, and State of New York, and Alfred Wild and Desiah T. Wild, his wife, of Rhinebeck, in the said State of New York, and J. Edwin Conant and Sallie Lee Conant, his wife, of Union township, Union county, in the State of New Jersey, party of the first part, and The Lake Superior Ship Canal Railroad and Iron Company, a body corporate, duly organized and existing under the laws of the State of Michigan, party of the second part, witnesseth, that whereas the said party of the first part, the said Perez J. Avery, Alfred Wild, and J. Edwin Conant, are the owners in fee of certain two hundred and twenty thousand acres of land, situate, lying, and being in the Upper Peninsula of the State of Michigan, and being two hundred and twenty thousand acres of land granted to the State of Michigan by the Congress of the United States, by an act entitled An act granting lands to the State of Michigan and Wisconsin to aid in the construction of a military road from Fort Wilkins, Copper Harbor, Keweenaw county, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin, approved March 3d, 1863; which said lands are particularly described and designated upon the maps and records of the office of the register of the land office at
40 Marquette, Michigan, to which said maps and records reference is hereby made for a fuller and more perfect description of said lands.

And whereas the said parties of the first part have subscribed to the capital stock of the party of the second part for five hundred shares of its capital stock of one hundred dollars a share, and have agreed to pay into said company, said party of the second part, two hundred thousand acres of said land in payment for said five hundred shares of said capital stock so subscribed by them: Now, therefore, the said parties of the first part, for and in consideration of said five hundred shares of said company's stock, and for one dollar in money by the said party of the second part, to them in hand well and truly paid by the said party of the second part, be-

fore the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, have and by these presents do grant, bargain, sell, remise, release, convey, and confirm unto the said party of the second part all and singular those two hundred and twenty thousand acres of land, being the same granted by act of Congress of the United States, entitled An act granting lands to the State of Michigan and Wisconsin to aid in the construction of a military road from Fort Wilkins, Copper Harbor, Keweenaw county, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin, ayproved March 3d, 1863; which said lands are fully described and designated on the maps and record books of the office of the register of the land office at Marquette, Michigan, and to which records and maps reference is hereby made for a fuller and more perfect description of said lands, saving and reserving from the operation of this deed twenty thousand acres of land, to be selected by taking the sections reserved in their order as they come, com-
41 mencing at the Wisconsin State line, and taking the sections on both sides of said road far enough north to get twenty thousand acres of land; to have and to hold the said lands hereby conveyed, together with all rights, claims, appurtenances, and privileges belonging to the same to the said party of the second party, and its successors and assigns forever. And the said parties of the first part covenant and agree to and with the said party of the second part that they, the said parties of the first part, are seized of a perfect and indefeasible estate in fee-simple in and to the above-described lands and premises, and have right, power, and authority in law to grant, sell, and convey the same, and that the title to the same in the said party of the second part they will warrant and forever defend against all persons whatever claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands and seals this first day of May, in the year of our Lord one thousand and eight hundred and seventy-one.

P. J. AVERY. [SEAL.]
ALMIRA AVERY. [SEAL.]
ALFRED WILD. [SEAL.]
D. T. WILD. [SEAL.]
J. EDWIN CONANT. [SEAL.]
SALLIE LEE CONANT. [SEAL.]

Signed, sealed, and delivered in presence of—
W. V. ARCHER,
E. A. PIERCE,
As to Avery and wife, Conant and wife, and Alfred Wild.

W. N. SAYRE.
JAS. H'Y THORNE,
As to Desiah Wild.

42 STATE OF NEW YORK, } *ss:*
City and County of New York, }

On this 5th day of June, A. D. 1871, before me, a commissioner of deeds of the State of Michigan, in Yew York, personally appeared

the above-named Perez J. Avery, and Almira Avery, his wife, Alfred Wild, J. Edwin Conant, and Sallie Lee Conant, his wife, known to me to be the persons described in, and who executed the foregoing instrument, and severally acknowledged the same to be their free act and deed; and the said Almira Avery and Sallie Lee Conant, on a private examination, separate and apart from their respective husbands, acknowledged to me that they executed the same freely and without any fear of or complusion of any one.

In witness whereof, I have hereunto set my hand and official seal.

[SEAL.] WM. V. ARCHER,
Commissioner of Michigan in New York.

STATE OF NEW YORK, }
County of Dutchess, } *ss:*

On this 7th day of June, A. D. 1871, before me, Wm. Sayre, a notary public, appeared the within named Desiah T. Wild, wife of Alfred Wild, to me known to be the person described in and who executed the foregoing instrument, who, on a private examination, separate and apart from her husband, acknowledged to me that she executed the same freely and without any fear or compulsion of any one.

[SEAL.] W. N. SAYRE,
Notary Public.

43 SCHEDULE D.

Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOHN L. SUTHERLAND, Trustee, Compl't,
against
THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON COMpany; Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucien Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the aforesaid Ship Canal Railroad and Iron Company, Def'ts. } 1568.

LUCIEN BIRDSEYE, Trustee, Complainant,
against
THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON CO.; Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee; and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, Defendants. } 1574.

THE UNION TRUST COMPANY OF NEW YORK, Trustee, Comlainant,
against
GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, and the Lake Superior Ship Canal Railroad and Iron Co., Defendants. } 1946.

Supplemental and Cross-Bill.

44 GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, Complainants,
against
JOHN SUTHERLAND, Trustee; CHARLES L. FROST, Trustee; Lucien Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Jonathan T. Wells, Samuel L. Smith, and William Harris, Defendants. } 1766.

And now come Meddaugh & Driggs, solicitors for the assignees in bankruptcy in said causes, and move the court that the aforesaid supplemental and cross-bill be held and considered as a cross-bill to all of the above-entitled causes, and that the proofs heretofore taken in each of said causes be held and considered as taken in all the said causes, and that the above-entitled causes be all brought on to be heard together and be heard as one cause.

And the court having heard Messrs. Meddaugh & Driggs in support of said motion, and Alfred Russell, Esq., solicitor for the complainants in the three original causes above named, consenting thereto, it is ordered and adjudged that the said motion be, and the same is hereby, granted, and that the said cross-bill be held and treated as a cross-bill in each of the three causes first above named, and that the said four causes above named be brought on for hearing together upon the pleadings and proofs in all the said causes, and that the proofs in each cause be considered and treated as introduced in all.

45 SCHEDULE —.

Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOHN L. SUTHERLAND, Trustee, Complainant,
against
THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON COMPANY; Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucien Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the aforesaid Ship Canal Railroad and Iron Company, Defendants. } 1568.

LUCIEN BIRDSEYE, Trustee, Complainant,
against
THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON COMPANY; Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee, and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, Defendants. } 1574.

46 THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant,
against
GEORGE JEROME and FERANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, and the Lake Superior Ship Canal Railroad and Iron Company, Defendants. } 1946.

Supplemental and Cross Bill.

GEORGE JEROME and FERANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, Complainants,
against
JOHN L. SUTHERLAND, Trustee; CHARLES L. FROST, Trustee; Lucien Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Trustee; Jonathan T. Wells, Samuel L. Smith, and William Harris, Defendants. } 1766.

These causes came on to be heard together as one cause pursuant to previous order at this term, and were argued by counsel, and thereupon and upon consideration thereof it is ordered, adjudged, and decreed as follows, to wit:

First. That the said The Lake Superior Ship Canal Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of,
47 and did issue, the series of bonds set forth in the bill brought by John L. Sutherland, trustee, namely, one thousand bonds of five hundred dollars each, numbered from 1 to 1,000, bearing date the first day of July, 1865, each payable at the Ocean Bank in the city of New York on the first day of July, 1875, and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, according to interest warrants thereto respectively attached.

Second. Also that the said company did duly authorize the execution of, and did duly execute and deliver to Columbus C. Douglas, of the city of New York, as set forth in said named bill, the mortgage which is therein fully set forth and described, said mortgage bearing date the first day of July, 1865, and duly executed by the officers of said company, under the seal thereof, and the execution duly proved and acknowledged so as to entitle the same to be recorded pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the mortgaged property is situated, and that the said mortgage was intended to secure, and does secure, the series of bonds described therein and which were issued as aforesaid.

Third. That the said mortgage was also executed by Columbus C. Douglass, the predecessor in the trust of the said John L. Sutherland, complainant above named, as trustee, on the day of the date of the said mortgage, and that said Columbus C. Douglass afterwards, on the ninth day of March, 1867, resigned the trusteeship, by

an instrument under his hand and seal, duly recorded in the counties aforesaid, and that on the 13th day of the same month
48 and year D. Randolph Martin, Esq., was, on proper petition, appointed his successor trustee by the Hon. George G. Barnard, a justice of the supreme court of the State of New York, by an instrument under his hand and seal, duly recorded as aforesaid; and that afterwards, on the 13th of April, 1872, the said D. Randolph Martin resigned his said trusteeship, by an instrument under his hand and seal, duly recorded as aforesaid, and thereafter, on the eighteenth day of May, 1872, the said John L. Sutherland, complainant, was appointed trustee by the Hon. Daniel P. Ingraham, a judge of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

Fourth. That the said Lake Superior Ship Canal Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Company, did duly authorize the issue of, and did issue, the series of bonds which are set forth in the above-named bill brought by Lucien Birdseye, complainant, namely: One thousand bonds of five hundred dollars each, numbered from 1 to 1000, bearing date the first day of July, 1868, and each payable at the Ocean Bank, in the city of New York, and bearing interest at the rate of ten per cent. per annum, payable semi-annually, on the first days of January and July in each year, according to the interest warrants thereto respectively attached.

Fifth. Also that the said company did duly authorize the execution of, and did duly execute and deliver, as set forth in said last-mentioned bill, the mortgage therein fully set forth and described, to D. Randolph Martin, of the city of New York, and Thomas
49 T. Davis, of the city of Syracuse, said mortgage bearing date the first day of July, A. D. 1868, duly executed by the officers of said company, under the seal thereof, and the execution duly acknowledged and proved, so as to entitle the same to be recorded under the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the said mortgaged property is situated, and that the said mortgage was intended to secure, and does secure, the series of bonds described therein, and which were issued as aforesaid.

Sixth. That the said mortgage was also executed by said D. Randolph Martin and Thomas T. Davis, predecessors of the said Lucien Birdseye, trustee complainant, on the day of the date of said mortgage; and that afterwards, on the thirteenth day of December, 1870, the said Martin and Davis resigned their trusteeship, by an instrument under their hands and seals, duly recorded in the counties aforesaid; and, thereupon, on the thirtieth day of December, 1870, the said Lucien Birdseye, complainant trustee, was appointed trustee, by the Hon. Daniel P. Ingraham, a justice of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded, as aforesaid.

Seventh. That all the said one thousand bonds secured by said mortgage to Columbus C. Douglass; and also, all the said one thousand bonds, secured by said mortgage to Thomas T. Davis and D.

Randolph Martin, were issued, negotiated and used by said Ship Canal Company, and are now held by *bona fide* holders thereof, for value.

Eighth. That the said Lake Superior Ship Canal Railroad and Iron Company, under its former name of the Portage
50 Lake and Lake Superior Ship Canal Company, did duly authorize the issue of, and did issue, the series of bonds which are set forth in the above-named bill, brought by Thomas N. McCarter, trustee, namely: Twelve hundred and fifty bonds, numbered from 1 to 1250, inclusive, each for one thousand dollars, and each payable at the Ocean National Bank, in New York, on the first day of July, 1871, bearing date the first day of July, 1870, and bearing interest at the rate of seven per cent. per annum, payable half yearly, on the first day of each month of January and July, A. D. 1871, according to interest warrants thereto respectively attached; that two hundred and fifty of the said bonds have been since retired, and only one thousand of said bonds, amounting to one million dollars, besides interest, remain outstanding.

Ninth. Also that the said company did duly authorize the execution of, and did duly execute and deliver, as set forth in said bill, the mortgage to Charles L. Frost, trustee, which is therein fully set forth and described, said mortgage bearing date the first day of July, A. D. 1871, and duly executed by the officers of the said company, under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan; and that the said mortgage was duly recorded in the proper counties, where the mortgaged property is situated and that the said mortgage was intended to secure, and does secure, the series of bonds described therein, and which were issued as aforesaid.

Tenth. That the said mortgage was also executed by Charles L. Frost, predecessor of the said Thomas N. McCarter, complain-
51 ant, as trustee, on the day of the date thereof; and that the said Charles L. Frost, on the first day of July, 1872, resigned his trusteeship, by an instrument under his hand seal, duly recorded in the counties aforesaid; and that on the second day of the same month, Thomas N. McCarter was appointed trustee by the Hon. William H. Leonard, a judge of the supreme court of the State of New York, by an instrument under his hand and seal which was recorded as aforesaid.

Eleventh. That the said mortgage to Charles L. Frost was intended to and did cover and convey the ship canal of said Portage Lake and Lake Superior Ship Canal Company, together with all the corporate franchises of said company, and all its real and personal property, and its four hundred thousand acres of land in the upper peninsula of Michigan, received in two grants from the United States and the State of Michigan, expressly subject, however, to the two aforesaid mortgages made by said company—one made to Columbus C. Douglas, as trustee, conveying the said canal and its franchises and the two hundred thousand acres of land granted by act of Congress of March 3, 1865, and the other made to D. Ran-

dolph Martin and Thomas T. Davis, trustee, as aforesaid, conveying the said canal and its franchises and the other property aforesaid, and also the two hundred thousand acres of land granted by act of Congress of July 3, 1866; and that the said Lake Superior Ship Canal Railroad and Iron Company made default in the payment of the principal of the said outstanding one thousand bonds, secured by said mortgage to Charles L. Frost, trustee, and the interest coupons thereto attached or belonging, on the first day of July, A. D. 1871, and that the due demand of the same was made, and
52 that the same remained overdue and unpaid, and that the same are now outstanding in the the hands of *bona fide* holders for value.

Twelfth. That after the execution and delivery of the said mortgages said Portage Lake and Lake Superior Ship Canal Company, on the twenty-ninth day of April, A. D. 1871, duly executed amended articles of association, amending its original articles of association, under and in pursuance of the provisions of section 2149, as amended in chapter 73 of the compl*ie*d laws of the State of Michigan, entitled "general provisions relating to corporations," so as, among other things, to change the name of said company from "The Portage Lake and Lake Superior Ship Canal Company," by which it had before that time been known and designated, to "The Lake Superior Ship Canal Railroad and Iron Company," by which title the said company, ever since the said 29th day of April, A. D. 1871, has been known and designated.

Thirteenth. That the said Lake Superior Ship Canal Railroad and Iron Company did duly authorize the issue of the series of bonds which are set forth in the bill above named, filed by the Union Trust Company of New York, complainant, namely, three thousand five hundred bonds of one thousand dollars each, payable in thirty years from the first day of May, 1871, with interest at seven and three-tenths per cent., payable semi-annually on the first days of May and November, in gold, and principal and interest payable at the office of The Union Trust Company, in New York, according to interest warrants thereto attached, the said bonds bearing date the first day of July, 1871; and that thirteen hundred of such bonds were duly issued by said company and duly executed by said
53 Union Trust Company of New York as trustee, and were negotiated and used by said Ship Canal Railroad and Iron Company, and are now outstanding in the hands of *bona fide* holders for value, and that twenty-two hundred of the said bonds are still in the custody of said Union Trust Company of New York, not issued.

Fourteenth. That the said Ship Canal Railroad and Iron Company did duly authorize the execution of, and did duly execute and deliver to the Union Trust Company of New York, as set forth in said bill, the mortgage therein fully set forth and described, bearing date the first day of May, 1871, and duly executed by the officers of said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the counties where the mort-

gaged property is located, and that the said mortgage was intended to secure, and does secure, the series of bonds therein described, to wit, thirteen hundred bonds actually issued as aforesaid, and that the said mortgage was intended to and did cover all the property of said company hereinbefore described, and was made expressly subject to all the prior mortgages hereinbefore described, and that the said Union Trust Company mortgage was also intended to cover two hundred thousand acres of land known as "the wagon road lands," which were acquired from the State of Michigan by one Francis W. Anthony, and which were subscribed to the capital stock of said company under the provisions of the laws of the State of Michigan; that the said Union Trust Company mortgage did actually
54 cover forty-seven thousand nine hundred and fifty-eight and eighty-five one hundredth acres of the said wagon road lands, to wit, the lands particularly described in "Exhibit C," attached to the bill filed by the said Union Trust Company of New York; and that the said thirteen hundred bonds, issued by said Union Trust Company, are a first lien on the said forty-seven thousand nine hundred and fifty-eight and eighty-five one hundredths ($47{,}958\frac{85}{100}$) acres of land. That the title to the remainder of said wagon road lands passed from the State of Michigan to third parties, so that as to the same the said Union trust mortgage covers only a possible equity, which equity, in the said residue of said two hundred thousand acres of wagon road lands, is also a security for said thirteen hundred bonds. And that said Union Trust Company mortgage is a first lien upon the said wagon road lands, and that as to said other property and land, to wit, said canal franchises and four hundred thousand acres of land, it is a lien junior and subsequent to the said McCarter, Birdseye, and Sutherland mortgages so designated (that is to say, the mortgages in which the last-named persons are respectively present trustees as aforesaid), and to the receivers certificates hereinafter mentioned.

Fifteenth. That this court did duly authorize its receiver, heretofore appointed under said bill brought by John L. Sutherland, trustee, to issue, and that the said receiver did issue, two series of receiver's certificates of indebtedness; the first series consisting of five hundred certificates numbered from 1 to 500, inclusive, each for one thousand dollars, and each payable at the National Park Bank in New York on the first day of July, 1873, bearing date the first day of July, 1872, and bearing interest at the rate of ten per cent. per
55 annum; the second series, consisting of one hundred and thirty-eight certificates, (but of which twelve, of one thousand dollars each, remain unissued,) the entire series being numbered from 1 to 138, inclusive, each for one thousand dollars, except the last, which was for three hundred dollars, and each payable in New York on the first day of May, 1875, bearing date the first day of May, 1874, and bearing interest at the rate of ten per cent., and that the said certificates are a first lien upon the said Ship Canal and corporate franchises, and upon the said two land grants of two hundred thousand acres each, paramount to the liens of all the mort-

gages hereinbefore set forth; but are not a lien upon any of the said wagon road lands, and hereinbefore mentioned.

Sixteenth. That the said Lake Superior Ship Canal Railroad and Iron Company made default in the payment of the principal of all said several issues of bonds or of the interest coupons thereto severally attached, or both, and that due demand of the same was made, as they respectively became due; and that the said Ship Canal Company remained in default for over sixty days after the dates when said principal or interest moneys respectively matured, and after the said over-due bonds and coupons respectively were presented, and prior to the beginning of all the aforesaid suits; and that the holders of more than fifty of each of said issues of bonds respectively, did thereafter respectively request said trustees, complainants, respectively to file the said respective bills of foreclosure.

Seventeenth. That the governor of the State of Michigan duly appointed agent according to law, who selected the four hundred thousand acres of land comprised in the aforesaid grants, from the
56 public lands in the upper peninsula of Michigan, subject to private entry, and not homestead, pre-emption, or mineral land, and that full lists and descriptions of said four hundred thousand acres of land were approved by the Secretary of the Interior, and certified to said State according to law, and were deposited, and remain of record in the Land Office of the United States, at Washington, and in the proper office of the State of Michigan, at Lansing, and that true copies of said lists and descriptions of the four hundred thousand acres of canal grant lands so selected are on file in the proofs under the said bill, brought by Thomas N. McCarter, trustee, attached to the deposition of George S. Frost, who was one of the said agents, and that all of the mortgages hereinbefore mentioned, and all the receiver's certificates of indebtedness hereinbefore mentioned and issued as aforesaid, and hereinbefore declared to be liens in the order of preference hereinbefore set forth, upon said four hundred thousand acres of land, described in said mortgages solely by reference to said acts of Congress, and of the State of Michigan, and not by parcels, do cover and convey, and are valid liens upon each and every parcel of land set forth and described in the aforesaid lists and descriptions of the selections of said four hundred thousand acres; and that said lands lie partly in the eastern and partly in the western districts, within the State of Michigrn, to wit, that part of said lands situated in the counties of Delta and Menominee, lying in the western district of Michigan, and the remainder in the eastern district of Michigan.

Eighteenth. That the said wagon road lands lie in the eastern district of Michigan; and that the description of the parcels
57 of said wagon roads lands is attached as "Exhibit C" to the bill filed by the Union Trust Company, of New York, which exhibit is the certificate of purchase number one of military road land under act No. 20 of the laws of 1864, approved February fourth, 1864, and which certificate, "Exhibit C," is a true copy of the list and certificate on file in the office of secretary of State of the State of Michigan; and that the said Union Trust Company mortgage is

a first lien upon each and every parcel of land set forth in said list or certificate; and is also a first lien upon any right or estate of the said mortgagor company in and to the rest and residue of the said 200,000 acres of wagon road lands.

Nineteenth. That all the said receiver's certificates of indebtedness, except twelve, as before mentioned, were issued, negotiated, and used, and are still outstanding and held by *bona fide* holders for value; and that the same are a first and paramount lien upon all of the property aforesaid, except the wagon road lands mentioned in the next preceding paragraph of this decree, and that the amount due upon both series of said receiver's certificates of indebtedness at the date of this decree is the sum of $934,478.00.

Twentieth. That as to 747 bonds of the issue secured by the said Sutherland mortgage, and as to 841 bonds of the issue secured by the said Birdseye mortgage, and as to 900 bonds of the issue secured by the said McCarter mortgage, and as to 786 bonds of the issue secured by the said Union Trust Company mortgage, it is in proof in the said cause, under the said supplemental and cross-bill, that they are now held by *bona fide* holders for value, and that the persons named in "Schedule A," attached to this decree, as holding said bonds are absolute owners in good faith for the value
58 of the bonds stated in said schedule, respectively, as held by them, and that the several sums due to the several holders of the said bonds of different issues and interest warrants, as well for principal as for the interest that is secured and remains unpaid up to the date of this decree, according to the computation made by the court, attached to this decree and made a part hereof, marked "Schedule A," amount to the sum of ($3,361,657.18-100) three million three hundred and sixty-one thousand six hundred and fifty-seven 18-100 dollars, and that sundry other bonds of each of said four issues remain outstanding and unpaid, and the holders hereof, and the amounts due thereon, remain to be ascertained in the manner hereinafter provided.

Twenty-first. It is further ordered, adjudged, and decreed that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of first July, 1868, and the alleged release of said land by Lucien Birdseye, trustee, as set forth in said cross-complaint, having taken place after the institution of the suit for foreclosure of said mortgage, were and are ineffectual and void.

Twenty-second. And it is further ordered, adjudged, and decreed that unless the said Lake Superior Ship Canal Railroad and Iron Company, or the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal Railroad and Iron Company, do pay, or cause to be paid, into the registry of this court for distribution to the holders named in "Schedule A," *pro rata*, with any amount that may hereafter be found to be due to the holders of the other bonds not yet ascertained, the
59 amount so computed and decreed to be due the holders named in "Schedule A," as aforesaid, together with the interest thereon from the date of this decree, and also the costs of these

suits, prior to the sale of said property, as hereinafter provided; that all and singular the said mortgaged Ship Canal corporate franchises, personal property, two land grants of two hundred thousand acres of land each, forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of wagon road lands, and all the right and equity of the said Ship Canal Company in the residue of said two hundred thousand acres of wagon road land, being the property mentioned in the various bills of complaint in this cause, be sold at public auction by or under the direction of Addison Mandell, Esq., a master in chancery of this court, or, in case of his death, absence, or inability to act, by any other master in chancey of this court; and that the sale be made at the front door of the court-house in the Co. of Houghton, in said district, in which county said canal personal property and a part of said six hundred thousand acres of land are situated.

Twenty-third. And this court now finds, upon the proofs, that the sale of said property ought to take place in the manner and parcels next herein specified, and it is accordingly ordered, adjudged, and decreed.

First. That the property covered and conveyed by the said Union Trust Company mortgage, that is to say, the forty-seven thousand nine hundred and fifty-eight eighty-five one hundredths acres of wagon-road lands, being that portion of said lands particularly described in "Exhibit C," attached to the Union Trust Company bill, together with all the equity of redemption or other right or
60 interest of said mortgagor corporation in the residue of said wagon-road lands; and also all the equity of redemption or after right or interest of said mortgagor corporation, as covered by the same mortgage, in and to the residue of the aforesaid property, viz., the said ship's canal and corporate franchises, and four hundred thousand acres of canal-grant lands, shall be offered, struck off, and sold, as one parcel, firstly, at said sale.

That, secondly, at said sale all the property covered by the said Birdseye mortgage, that is to say, the two hundred thousand acres of land granted by the act of Congress of July 3d, 1866, together with the equity of redemption and all other rights or interest of said mortgagor corporation, as covered by the last-mentioned, in and to the said ship canal corporate franchises, and two hundred thousand acres of land granted by the act of Congress of March 3d, 1865, shall be offered, struck off, and sold, also as one parcel; and

That, thirdly, at said sale the property covered by the said Sutherland mortgage, that is to say, the said ship canal and corporate franchises, and the two hundred thousand acres of land granted by said act of Congress of March 3d, 1865, as contained in the aforesaid lists and descriptions thereof, shall be offered, struck off, and sold, also as one parcel; that is to say, that the sale of the said property covered by the Union Trust mortgage, excepting the said wagon-road lands, shall be made subject to the liens of the said McCarter mortgage, the said Birdseye and Sutherland mortgages, and the said receiver's certificates, and that the sale of the property covered by the Birdseye mortgage shall be made free of incumbrance, except

61 as to the canal corporate franchises and land grant of March 3d, 1865, the sale of which shall be made subject to the lien of said Sutherland mortgage, and that the sale of the property covered by the said Sutherland mortgage shall be made free from any incumbrance; and

That, fourthly, at said sale, the personal property covered by said Sutherland mortgage shall be sold in view of the same where it lies, in said county of Houghton, in said district; and that if it be necessary, in order to so sell the same, the said master may orally adjourn the said sale of personal property to the place or places where the said personal property may be in said county, and from day to day, or otherwise, as may be necessary.

Twenty-four. A. That the proceeds of the said sales shall be apportioned and paid out in manner following, to wit:

(1.) That the proceeds of the personal and real property covered by the Sutherland mortgage shall form one fund.

(2.) That the proceeds of the property covered by the Birdseye mortgage shall form another fund.

(3.) That the proceeds of the property covered by the Union Trust mortgage shall form another fund.

(B.) That the taxable costs under the various bills above entitled shall be apportioned upon and paid ratably out of the said funds.

(C.) That the amount due upon the said two series of the said receiver's certificates of indebtedness shall be next paid out of the said Sutherland fund and out of the said Birdseye fund ratably according to the amount produced by the respective sales.

62 D. That out of any balance remaining in the Sutherland fund the amounts found due upon the said respective Sutherland bonds shall be paid *pro rata;* and, if any balance should remain after such payment, it shall be added to the said Birdseye fund.

E. That out of the said Birdseye fund there shall first be paid the balance, if any, due upon the first and second issues of said receiver's certificates of indebtedness, and out of any surplus remaining after such payment, the amounts found due upon the respective Birdseye bonds shall be paid; and if any surplus shall remain after such payment the same shall be applied upon the decree heretofore made by this court in the cause in which Thomas N. McCarter, trustee, was complainant, and the said Ship Canal Company and others, defendants; and if after payment of the amount found due under the said last-mentioned decree there shall remain any balance the same shall be added to the aforesaid fund arising from the sale of the property covered by the said Union Trust mortgage.

F. That said last-named fund shall be applied to the payment of the amount found due upon the said thirteen hundred Union Trust bonds, respectively; and that any surplus remaining after such payment shall be paid to the said assignees in bankruptcy.

Twenty-five. That in payment of the various bids the said certificates of indebtedness, and the bonds of the different issues, shall be received in manner following, to wit:

A. The said receiver's certificates of indebtedness, of both series,

shall be received in payment of bids for the Sutherland and Birdseye properties in the proportions that said properties are re-
63 spectively chargeable with the payment of said certificates, as hereinbefore declared.

B. And for any balance that may remain due upon the bid for the Sutherland property, the bonds issued under the Sutherland mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds respectively, nor exceeding their *pro rata* valuation, as ascertained by the amount of the said last-mentioned bid.

C. And for any balance that may remain due upon the bid for the Birdseye property, the bonds issued under the Bidseye mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds respectively, nor exceeding their *pro rata* valuation, as ascertained by the amount of the said last-mentioned bid.

D. And for the bid upon the Union Trust property, the bonds issued under the Union Trust mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds respectively, nor exceeding their *pro rata* valuation, as ascertained by the amount of the said last-mentioned bid.

Twenty-sixth. It is further ordered, adjudged, and decreed that said master give public notice of the time and place of said sale, according to the course and practice of this court, which notice shall set forth the order and manner of said sale, according to paragraph twenty-third of this decree, and may describe said lands generally, as they are described in said mortgages, or by quantity and general description, as contained in the respective counties, and need not describe them in detail according to the description of parcels, as found in said lists of selections on file.

64 Twenty-seventh. And it is further ordered, adjudged, and decreed that as soon as possible after the filing of his report of sale, which report shall describe said lands generally, as described in the mortgage, or as contained in the respective counties, and need not contain detailed descriptions of parcels, as found in said list of selections on file, and after the confirmation of said report and sale, said master shall proceed to ascertain the holders of, and the amount due upon, the outstanding bonds held by persons not mentioned in Schedule "A," and any coupons which may be thereto attached, or belonging thereto, or otherwise outstanding, unpaid and held by *bona fide* owners for value, and that he fix a reasonable time and place for the production before him of any such bonds, and for proof of the amount due thereon, and give notice thereof to the solicitors for said assignees, and the complainants in the said bill of foreclosure; and in case such amount shall not be proved satisfactorily before him that he have authority to adjourn the hearing, and publish a notice for at least thirty days, daily, Sundays and holidays excepted, in one daily newspaper, printed and published in the city of Detroit, and in one daily newspaper, published and printed in the city of New York, requiring all holders or owners to produce said bonds and coupons before him at a given time and place, to

which the hearing shall have been adjourned, and shall send by mail, post-paid, a copy of such notice to the persons who, upon diligent inquiry to be made by said master, shall appear to hold any of said bonds; and said master may adjourn said hearing in his discretion, and upon completion thereof, shall file his report of the same with the proofs taken by him.

65 Twenty-eighth. And it is further ordered, adjudged, and decreed that upon the coming in and confirmation of said report concerning the holders of and the amount due upon bonds not included in Schedule "A," and any coupons thereto attached or belonging thereto, the register of the court shall make distribution of the remaining funds among the holders of the bonds so proved before the master, according to their respective rights as hereinbefore declared, and shall cancel the bonds if fully paid, and, otherwise, shall endorse upon the bonds the amount paid.

Twenty-ninth. It is further ordered, adjudged, and decreed that the said defendants, The Lake Superior Ship Canal Railroad and Iron Company and George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal Railroad and Iron Company, and all persons claiming or to claim from and under them be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged ship canal, corporate franchises, four hundred thousand acres of canal grant land, two hundred thousand acres of wagon road lands, and personal property aforesaid, and every part and parcel thereof.

Thirtieth. And it is further ordered that the purchasers or purchase of said ship canal, corporate franchises, four hundred thousand acres of canal grant lands, and two hundred thousand acres of wagon road lands at such sales be let into possession thereof, and that any of the parties to said causes who may be in possession of said property or any part thereof, and any person who, since the commencement of said suits, has come into possession under them, or either of them, deliver possession thereof to the purchaser or pur-

66 chasers on production of the master's deed thereof, and a certified copy of the order confirming the report of such sales after such order has become absolute.

Thirty-first. And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amounts so computed due to said holders of the bonds included in "Schedule A," and subsequently found to be due to the holders of the bonds not included in "Schedule A," or any part thereof, after such distribution by the master, with interests, costs, and expenses of the sale as aforesaid, the said defendant, The Lake Superior Ship Canal Railroad and Iron Company, which is in its corporate capacity liable for the debts secured by said respective mortgages, do pay to the complainants therein, respectively, in the order of their respective preferences, the amounts of such deficiencies, with interest thereon, and that the said respective complainants have executions therefor.

Thirty-second. The descriptions of the property authorized to be sold under and by virtue of this decree, so far as the same can be

ascertained from the mortgages above referred to, or from the pleadings, proceedings, and proofs in this cause, are as follows:

1. The ship canal belonging to said Lake Superior Ship Canal Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Keweenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, with all its appurtenances, and including all lands, tenements, and hereditaments necessary to the full use and enjoyment of said canal and covered by said mortgages, or any of them, together with
67 all the rights and franchises growing out of or appertaining to said ship canal, and together with all the corporate rights and franchises of said Lake Superior Ship Canal Railroad and Iron Company.

2. All the vessels, tugs, dredges, and equipments, together with all other goods or chattels of said company, in any way relating to or appertaining to or connected with said ship canal, or the using or operating of the same.

3. All and singular the four hundred thousand acres of land, being the same granted to the said Lake Superior Ship Canal Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, by two several acts of Congress, the first being an act entitled "An act granting lands to to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," approved March 3rd, 1865, and granted and conferred upon said Portage Lake and Superior Ship Canal Company, by act of the Legislature of the State of Michigan, passed on or about the 18th March, 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake, to connect with Lake Superior, and to provide for the construction of the same," and the second by an act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3rd, 1866, accepted by said State by act of March 27th, 1867, and enuring to said Lake Superior Ship Canal Railroad and Iron Company by virtue of said act of Congress, and all and singular forty-seven thousand nine
68 hundred and fifty-eight and eighty-five one hundredths acres of land subscribed to the capital stock of the said Lake Superior Ship Canal Railroad and Iron Company, and therefore acquired from the State of Michigan by one Francis W. Anthony, and being parcel of two hundred thousand acres of so-called wagon road lands acquired from the State aforesaid by Francis W. Anthony aforesaid, under the provisions of act number 20 of the laws of the State of Michigan of 1864, approved February 4th, 1864, being an act to provide for the construction of a wagon road from Fort Wilkins, in the State of Michigan, to Fort Howard, in the State of Wisconsin, together with all the right and equity of the said mortgagor corporation, in and to the rest and residue of the said two hundred thousand acres; and all the rights, benefits, and

equities of redemption of the said The Lake Superior Ship Canal Railroad and Iron Company, and of George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said company, in all the said ship canal, corporate franchises, said four hundred thousand acres of canal grant lands, and said two hundred thousand acres of wagon road lands, under the incumbrances declared to be existing valid liens thereon in and by this decree.

Thirty-third. And it is further ordered, adjudged, and decreed that the complainants, in the several bills of foreclosure aforesaid, do recover their costs respectfully to be taxed, but not as against said assignees.

Thirty-fourth. And it is further ordered that any of the parties in any of the said above-entitled causes, or who may be interested in any of the said various issues of bonds, or any parties who may acquire the title to any of said mortgaged property, may
69 apply to the court upon the filing of this decree, for any other or further order or relief which may be necessary or proper in the premises.

"SCHEDULE E."

United States of America.

$1,000.	(VIGNETTE.)	$1,000.
Number 2318.	STATE OF MICHIGAN.	Number 2318.

Lake Superior Ship Canal Railroad and Iron Company.

Know all men by these presents, that the Lake Superior Ship Canal Railroad and Iron Company is indebted to the Union Trust Company, of New York, in the sum of one thousand dollars, in United States gold coin, which sum it promises to pay to the said Union Trust Company, or bearer, at the office of said Trust Company, in the city of New York, on the first day of May, 1901, which interest thereon at the rate of 7 and 3-10 per centum, per annum in United States gold coin, payable semi-annually, at the office of said Trust Company, on the first days of May and November in each year, upon the presentation and surrender of the annexed coupons. This bond is one of a series of three thousand five hundred, of like amount, tenor, and date, numbered from 1 to 3500 inclusive, and issued by the said Lake Superior Ship Canal Railroad and Iron Com-
70 pany, to provide the funds to take up and cancel all the bonds of said company heretofore issued, and to build a railroad from Green Bay to the Iron Fields of said company, and to provide the means to open and develop the same. The payment of the principal and interest of said bonds is secured by a deed of trust, bearing even date herewith, made by the said Lake Superior Ship Canal Railroad and Iron Company, unto the said Union Trust Company, conveying unto the said Union Trust Company, in trust for the security of the payment of the principal and interest of this issue of bonds, its ship canal, twenty-four miles long and 100 feet wide, from Kewenaw Bay through to Lake Superior, and six hundred

thousand acres of pine and mineral lands in the State of Michigan, and the railroad from Green Bay to said company's Iron Fields, together with all the property of said Lake Superior Ship Canal Railroad and Iron Company, real and personal, and its rights, privileges and franchises. And it is agreed that if the said Company shall fail to pay the principal, or any part thereof, or any of the interest on any of the said bonds, at any time when the same shall become due and payable, then, after six months from such default and upon the written request of the holders of $500,000 of said bonds, or of such of them as shall have been actually and in good faith negotiated and issued and shall then remain unpaid, the said Union Trust Company, trustee, is authorized and required to convert said canal and its equipments, and said railroad and its equipments, and all the said lands, franchises and property, into money, and apply the same to the payment of said bonds and such interest as may then be outstanding, with power to buy up said property for the benefit of the bondholders.

71 This bond will pass by delivery unless registered in the books of the company, in which case it will only pass by being transferred by the registered holders thereof until some such holder shall make it payable to bearer, when it shall again pass by delivery.

In testimony whereof the said company has caused its corporate seal to be hereunto affixed and these presents to be signed by the president and treasurer, the first day of May, in the year one thousand eight hundred and seventy-nine, and the certificate of said Union Trust Company to be inscribed thereon.

[Lake Superior Ship Canal Railroad and Iron Company.]

P. J. AVERY, *President.*
ALFRED WARD, *Treasurer.*

$36.50. $36.50.

The Lake Superior Ship Canal Railroad and Iron Company will pay to bearer thirty-six and $\frac{50}{100}$ dollars, in American gold coin, at the office of the Union Trust Company of New York, on the first day of Nov'r, 1871, being semi-annual interest due on bond No. 2318.

ALFRED WILD, *Treasurer.*

72 (Endorsed:) No. 2318. Lake Superior Ship Canal Railroad & Iron Company. First mortgage $7\frac{3}{10}$ per cent. Land grant bond. $1,000. Coupons payable May 1st and Nov'r 1st at office of Union Trust Company, New York. Principal and interest payable in gold coin. This is to certify that this bond is one of three thousand five hundred bonds of $1,000 each, secured by mortgage or deed of trust within referred to. Union Trust Company of New York, trustee, by I. H. Frothingham, president.

73 "SCHEDULE *Ca.*"

Deed of Trust.

Lake Superior Ship Canal Railroad and Iron Company.

This indenture, made and entered into the first day of May, one thousand eight hundred and seventy-one, by and between the Lake Superior Ship Canal Railroad and Iron Company, a corporation existing under the laws of the State of Michigan, party of the first part, and the Union Trust Company of New York, party of the second part, witnesseth that whereas the party of the first part, by act of incorporation executed the fifth day of July, A. D. 1864, in accordance with an act of the Legislature of the State of Michigan, entitled "An act to provide for the formation of companies to construct canals and harbors, and improve the same," approved March 13th, 1861, and the several acts amendatory thereof or supplementary thereto since passed, and amended by filing amended articles of association, executed on the twenty-ninth day of April, A. D. 1871, in accordance with the provisions of section two thousand one hundred and forty-nine, in chapter seventy-three, of the compiled laws of the State of Michigan, entitled "General provisions relating to corporations," has become entitled to valuable franchises, rights of way, lands, and property, including the right to locate, establish, construct, and use, and to enforce tolls for the use of the same, a certain ship canal from Kewenaw Bay, through the entrance from Kewenaw Bay to Portage Lake, through said lake to its head at the neck of land called the "Portage," thence through said neck of land to Lake Superior;

74 And whereas the said party of the first part is the owner of a constructed canal through from Kewenaw Bay to Portage Lake, through said lake to the head thereof, and through the "Portage," so called, to Lake Superior, a distance of twenty-four miles, and has the right to use and enforce the payment of tolls for the same;

And whereas the said party of the first part is the owner of six hundred thousand acres of land, situate, lying, and being in the State of Michigan, and hereinafter more particularly and fully described;

And whereas, also, the said party of the first part, on the first day of July, A. D. 1865, being then known as the "Portage Lake and Lake Superior Ship Canal Company," for the purpose of raising the money necessary to build that portion of its canal that extends through the "Portage," so called, from Portage Lake to Lake Superior, executed and delivered to Columbus C. Douglass, of the city of New York, a deed of trust or mortgage, by which the said party of the first part, then being the "Portage Lake and Lake Superior Ship Canal Company," and acting in that name and title, mortgaged or deeded in trust to said Columbus C. Douglass the said part of the canal now owned by the said party of the first part, extending from Portage Lake through the "Portage," so called, to Lake Superior, then to be constructed, but since constructed by the said party of the first part,

and now constituting a part or section of the canal owned by the party of the first part, and hereinafter described and conveyed; and also mortgaged two hundred thousand acres of land, situate, lying, and being in the State of Michigan, and forming a part of the six hundred thousand acres hereinafter conveyed, which said
75 mortgage or deed of trust was made to secure the payment to the holders thereof of the principal and interest of a series of one thousand bonds of the denomination of five hundred dollars each, payable ten years from the date thereof, all of which said bonds were issued and sold by the said party of the first part, then the said Portage Lake and Lake Superior Ship Canal Co., and the proceeds thereof applied to the construction of said section of said canal; and the same now constitutes an outstanding and subsisting indebtedness against said party of the first part, with a specific lien as above stated, the principal of which will become due and payable on the first day of July, A. D. 1875.

And whereas also the said party of the first part, on the first day of July, 1868, then being known as the "Portage Lake and Lake Superior Ship Canal Company," and acting in that name and under that title in order to raise a further sum of money necessary to build said section of said canal through the "Portage," so called, from Portage Lake to Lake Superior, executed and delivered to Thomas T. Davis, of Syracuse, and D. Randolph Martin, of the city of New York, a deed of trust or mortgage, dated upon that day, by which the said party of the first part, as said Portage Lake and Lake Superior Ship Canal Company, mortgaged or conveyed to said Thomas T. Davis and D. Randolph Martin, the said section of the canal now owned by the party of the first part, then in progress of construction, subject to the said mortgage or deed of trust to Columbus C. Douglass, and two hundred thousand acres of land, the same being distinct from the said lands conveyed by the said mortgage or deed of trust to the said Columbus C. Douglas, but constituting a part of
76 the six hundred thousand acres of land now owned by the said party of the first part, and hereinafter particularly described and conveyed to secure the payment to the holder or holders thereof of the principal and interest of a series of one thousand bonds of five hundred dollars each, numbered from 1 to 1000, inclusive, dated on that day, and payable in ten years, which said last-mentioned bonds the said party of the first part negotiated and sold and applied the proceeds thereof to the building of said section of said canal, and said bonds are now a valid, outstanding, and substituting indebtedness of the said party of the first part, and are a valid specific lien upon said section of said canal, and upon said two hundred thousand acres of land last above mentioned, the principal sum of which said indebtedness will be due and payable on the first day of July, A. D. 1878.

And whereas also the party of the first part, then being the "Portage Lake and Lake Superior Ship Canal Company," and acting in that name and under that title, on the first day of July, A. D. 1870, further to raise and procure the money necessary to complete said section of said canal through from Portage Lake to Lake Superior

above described, executed, and delivered to Charles L. Frost, of the city of New York, a mortgage or deed of trust, dated on that day, and conveying the said section of the said canal above described, and the four hundred thousand acres of land covered by the two mortgages or deed- of trust above recited, subject to the two mortgages or deeds of trusts aforesaid, to secure to the holder or holders thereof the payment of the principal and interest of one thousand two hundred and fifty bonds of one thousand dollars each, numbered from 1 to 1250, inclusive, the prin-
77 cipal of which said bonds will be payable on the first day of July, A. D. 1871, which said last-mentioned bonds have not been sold by said party of the first part, but have been pledged or hypothecated for diverse loans made by said party of the first part, in its said former name of the "Portage Lake and Lake Superior Ship Canal Company," and under that title, and amounting in the aggregate to the sum of six hundred and twenty-five thousand dollars, and making the whole bonded indebtedness of the party of the first part, including the three series of bonds above recited, one million six hundred and twenty-five thousand dollars, and covering with specific liens the said section of said canal owned by the party of the first part, and extending from Portage Lake through the "Portage," so called, to Lake Superior, and four hundred thousand acres of land, being part of the land now owned by the said party of the first part and covered by this deed, as hereinafter described and conveyed.

And whereas, also, the said party of the first part, on the twenty-ninth day of April, A. D. 1871, duly executed "amended articles" of association, amending its original articles of association, under and in pursuance of the provisions of section two thousand one hundred and forty-nine, in chapter seventy-three, of the Compiled Laws of the State of Michigan, entitled "General provisions relating to corporations," so as, amongst other things, to change the name of the said party of the first part from the "Portage Lake and Lake Superior Ship Canal Company," by which it had before that time been known and designated, to the "Lake Superior Ship Canal Railroad and Iron Company," by which said title the said party of the first
78 part, from and after the said twenty-ninth day of April, A D. 1871, has been and will be known and designated and transact its business.

And whereas, also, the said party of the first part is the owner of a large part of the "Menomonee Iron Belt," so called, the same being about thirty-three thousand acres of the six hundred thousand acres of land above referred to, and hereinafter described and conveyed; and the said party of the first part, in order to utilize and improve the said iron lands, and make them immediately productive, has resolved to construct a railroad from said iron fields to some point on Green Bay, a distance of about forty miles, the route of which is hereafter to be fixed by the said party of the first part, upon the recommendation of its engineers, and at a meeting of the directors of the said party of the first part, the Lake Superior Ship Canal Railroad and Iron Company, it was unanimously resolved that, in order to pay

and take up the present bonded indebtedness of this company and redeem the bonds issued for the construction of the canal as above recited, and provide for the necessary funds to build and equip said railroad from the iron fields owned by this company to Green Bay, and pay the floating debt of this company contracted to build said canal, this company will issue a series of three thousand and five hundred bonds of one thousand dollars each, payable in thirty years from the first day of May, A. D. 1871, said bonds to bear interest at the rate of seven and three-tenths—7 3-10—per cent, per annum, payable semi-annually on the first days of May and November, in each year, at the Union Trust Company of New York, the principal and interest payable in gold; and it was resolved that, to secure the payment of the principal and interest of said bonds to the holders
79 thereof, according to the tenor thereof, the president and treasurer of this company to be, and they are hereby, authorized and directed to execute in due form a deed of trust or mortgage, in the name of this company and under its seal, to the Union Trust Company of New York, trustee, to secure an issue of three thousand and five hundred bonds of the denomination of one thousand dollars each, to be numbered from 1 to 3500, consecutively and inclusive, said deed of trust or mortgage to cover and convey all this company's canal in Michigan, extending from Kewenaw Bay through to Lake Superior, a distance of about twenty-four miles, now constructed, all the rights, privileges, and franchises of this company connected with the same; and also to cover and convey six hundred thousand acres of land owned by this company, situate, lying, and being in the State of Michigan; and also to cover and convey the railroad of this company hereafter to be constructed from its iron fields in the Menomonee iron belt, together with all the rolling stock whatever, piers, stations, depots, and all the real and personal property connected with the use of said railroad, and all rights, franchises, and immunities connected with or belonging to said railroad, when partially or fully constructed.

Now, therefore, this indenture witnesseth that the party of the first part, to secure the payment of the said bonds or obligations, and the interest thereon, and the performance of the covenants on its part hereafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part, at the time of the execution hereof, the receipt of which sum
is hereby acknowledged, hath granted, bargained, sold, as-
80 signed, set over, or released, conveyed, and confirmed, and hereby doth grant, bargain, sell, assign, set over, or release, convey, and confirm unto the said party of the second part all and singular the canal aforesaid constructed, through from Kewenaw Bay, through Portage river and Lake, and through the neck of land called the "Portage" to Lake Superior, with all the rights and franchises growing out of or appertaining to said canal, together with the income, profits, or tolls to be collected, recovered, or enjoyed by the said party of the first part, or in anywise belonging to said party of the first part, for the use of said canal, together with all rents, income, issues, profits, moneys, rights, benefits, and advantages

derived, or which in any way may be derived from said canal; and also six hundred thousand acres of pine and mineral lands situate, lying, and being in the State of Michigan, and described as follows: Two hundred thousand acres, being that certain two hundred thousand acres of land granted by act of Congress, approved March 3d, 1865, to the State of Michigan, and entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," and granted to the party of the first part, under its former name of the "Portage Lake and Lake Superior Ship Canal Company," by act of the Legislature of the State of Michigan, approved March 18, 1865, and duly registered in the office of the register of the land office at Marquette, Michigan, and in the General Land Office at Washington; and reference is hereby made to the records of the said land office at Marquette, Michigan, and to the records of the General Land Office at Washington for a fuller and more perfect description of said two hundred thousand acres of land; and
81 also two hundred thousand acres of land, being the same granted to the party of the first part, under its former name of the "Portage Lake and Lake Superior Ship Canal Company," by act of Congress of the United States, approved July 3d, 1866, which said lands are duly registered in the office of the register of the land office at Marquette, Michigan, and in the General Land Office at Washington, and reference is hereby made to the records of the said land office at Marquette, Michigan, and to the records of the General Land Office at Washington, for a fuller and more perfect description of said lands, and also two hundred thousand acres of land situate, lying, and being in said State of Michigan, subscribed to the capital stock of the party of the first part, and fully and particularly described in a full covenant deed made by Perez J. Avery, Alfred Wild, and J. Edwin Conant, and their wives, dated on the first day of May, A. D. 1871, conveying said last-mentioned two hundred thousand acres of land to the said party of the first first, which said deed is duly recorded in the office of the register of deeds for Houghton, Marquette, Ontonagon, and Kewenaw counties, in the State of Michigan, and reference is hereby made to said records of said deed for a fuller and more perfect description of said two hundred thousand acres of land, and making in all of said three descriptions six hundred thousand acres of land by Government survey; and all of the railroad of the said party of the first part now constructed, or hereafter to be constructed, from some point in the Menomonee iron belt, at or near township 42, north of range 29 west, and running from thence by some feasible and practible route hereafter to be selected by the engineers of the party of the first part, to some
82 point on Green Bay, with all the rights, privileges, and franchises of said company connected therewith, together with all the locomotives, cars, machinery, tools, implements, and materials, and all docks, piers, wharves, depots, and stations, and all personal and real property of every name, nature, and description now owned, used, or employed, or hereafter to be owned, used, or employed, in connection with said canal or railroad, or either of them.

To have and to hold all and singular the premises, rights, franchises, property, real and personal, aforesaid, with the appurtenances, unto the said party of the second part and its successors, in trust, however, for the person or persons, firm or firms, and bodies politic or corporate who have heretofore or shall hereafter, at any time, become and be from time to time the purchasers or holders or owners of the said bonds, or any or either of them, subject, however, to the possession and management of said canal and railroad and property, including, rents, incomes, issues, and profits aforesaid by said party of the first part, its successors or assigns, so long as no default shall be made in the payment of either principal or interest of the bonds, or any of them, and so long as said party of the first part shall well and truly observe, keep, and perform all and singular the covenants and conditions in said bonds, and in this indenture expressed, to be observed, kept, or performed by or on behalf of said party of the first part, the trust, uses, and purposes upon which the premises, rights, franchises, and property, real and personal, aforesaid, are coveyed to and are to be had, held, and disposed of by the party of the second part and its successors are as follows, that is to say:

83 ARTICLE I.

Upon the execution of this deed of trust and the series of bonds amounting to three million and five hundred thousand dollars herein provided for one thousand six hundred and twenty-five of the bonds of the par value of one million six hundred and twenty-five thousand dollars shall be retained by the party of the second part, to be by it used to fund the bonded debt of the party of the first part, as hereinbefore specifically set forth, and the redemption and cancellation of the outstanding bonds of the party of the first part, as follows:

Upon the presentation by any person or persons or bodies corporate to the said trustee the party of the second part or any of the bonds of the said party of the first part, amounting at par to any number of even thousand of dollars, of the series issued either on the first day of July, A. D. 1865, or on the first day of July, A. D. 1868, it shall be the duty of the said trustee, the party of the second part, if the holder or holders of said bonds shall so request, to redeem said bonds by paying the par value thereof, in the bonds of this issue, at par, using such portion of the said sixteen hundred and twenty-five bonds so retained by said party of the second part as shall be required for that purpose, and upon the presentation by any person or persons or bodies corporate to the said trustee, the party of the second part, of any of the bonds of the said party of the first part of the issue of A. D. 1870, as above described, it shall be the duty of said trustee, the party of the second part, if requested so to do by the holder or holders of said bonds, to redeem said bonds at the rate of fifty cents on the dollar of their par value, the
84 rate at which they have been pledged by the party of the first part, and by paying for them in the bonds of this issue at par, and for that purpose to use a portion of the sixteen hundred

and twenty-five bonds pledged for that purpose. Provided, however, that said trustee shall be required to redeem bonds of either of the above-mentioned issues only when presented in such amounts as will pay for an even number of the bonds of this issue, and it shall be the duty of the trustee, upon the redemption of any of the aforesaid bonds of the issues of 1865, 1868, or 1870, immediately to cancel the same and deliver the same to the party of the first part, upon a receipt for the same being given.

ARTICLE II.

In case that, at the end of one year from the date of this deed, any of the said sixteen hundred and twenty-five bonds deposited with said trustee to be used to fund the issue of 1865, 1868, and 1870 as aforesaid should remain unused in the hands of said trustee it shall be the duty of said trustee to sell the same as soon as or whenever par and accrued interest shall be offered for the same, and use the proceeds of the same to pay and redeem such of the bonds of the said issues of 1865, 1868, and 1870 as shall not before that time have been presented, redeemed, and cancelled, and upon the payment, redemption, or cancellation of all of said bonds of the issues of 1865, 1868, and 1870 the said trustee, the party of the second part, shall account with the party of the first part for the said sixteen hundred and twenty-five bonds or the proceeds thereof, if sold, and pay over to the said party of the first part any portion of the same not necessarily or legitimately used under the aforesaid trust.

85 ARTICLE III.

Upon the execution of this deed and the series of bonds herein provided for, the said trustee of the party of the second part shall retain in its hands one thousand of said series of bonds of the par value of one million of dollars as a fund to provide for the construction and equipment of the railroad of the party of the first part, as herein provided for, and shall dispose of the same as follows: upon the completion of every section of five miles of said road from Green Bay to the iron fields as hereinbefore mentioned, said trustee shall pay over to the order of the party of the first part one hundred of said bonds, or the proceeds thereof if sold, until the whole road is constructed, when the said trustee shall pay over to the party of the first part the remainder of said one thousand bonds, or the proceeds thereof if the same shall have been sold; provided that said trustee may dispose of said one thousand bonds at such price as shall be approved by the party of the first part, in which case the proceeds of said bonds shall be held as a fund to build said road, and appropriated as above provided for upon each complete section of said road.

ARTICLE IV.

And it is expressly covenanted and agreed by the party of the first part that in addition to the interest provided to be paid in and by the said bonds, it will deposit with the said party of the second

part a sum equal to two per cent. upon the whole amount of bonds issued and secured under this deed of trust, commencing on the first day of May, A. D. 1876, and depositing said two per cent. annually on the first day of May in each and every year until said bonds
86 become due, to be a sinking fund for the ultimate payment of said bonds.

ARTICLE V.

And it is further expressly covenanted and agreed, that in case the said party of the first part should at any time before the maturity and payment of the bonds herein and hereby secured, desire to sell and dispose of any portion of the said lands herein and hereby mortgaged and conveyed, it shall be the duty of the said party of the second part, upon the written request of the said party of the first part, to appoint three disinterested appraisers, persons in whose judgment, integrity and experience the said party of the second part, the said trustee, has confidence, who shall after careful examination and investigation and due inquiry, return under oath their appraisal of said lands to the said trustee, dividing the same into four classes, as follows:

1st, iron lands; 2nd, pine lands; 3rd, copper and other mineral lands; 4th, hardwood lands; and it shall be the duty of said trustee to consent to the sale of any of the said lands at prices equal at least to the said appraisal; and upon receiving from the party of the first part, or from the purchasers, payment for said lands to at least the amount of said appraised value, either in money or one-third thereof in money, and the balance secured by mortgage upon the land sold, it shall be the duty of the party of the second part to execute and deliver to the party of the first part, or to said purchaser, a release discharging said land so sold and paid for from the operation and lien of this mortgage or deed of trust, and shall use the money secured from such sales of land and from the se-
87 curities given upon such sales as a fund for the ultimate payment and redemption of the bonds hereby secured; provided, however, that the iron lands, of which there are about thirty thousand acres, shall not be sold less than one hundred dollars per acre; the pine lands, of which there are about three hundred and fifty thousand acres, less than ten dollars per acre; the copper and other mineral lands, of which there are about eighty thousand acres, less than seven dollars per acre; and hardwood lands, of which there are about one hundred and forty thousand acres, less than five dollars per acre.

ARTICLE VI.

It shall be the duty of the said trustee, the party of the second past, at all times, when it has money in hand belonging to this trust, arising either from the sinking fund hereinbefore provided for or from the sale of lands as above specified, to use the same to purchase in the bonds hereby secured, if the same shall be offered at par and accrued interest; and all bonds of the issue secured by this deed, when purchased by the said trustee with funds belonging to this trust, shall be at once cancelled; and whenever said trustee

shall have money in hand for the redemption of any of the bonds of the party of the first part said trustee may advertise for tenders for the delivery of any of the bonds of the party of the first part then outstanding, and said trustee may, in its discretion, accept any such tenders that it may deem just and fair, and whenever the money in the hands of the said trustee belonging to this trust, arising either from the sale of lands or from the sinking fund, to be paid in as aforesaid, shall be equal to all the bonds of this issue then outstanding at par, the said trustee shall release and
88 discharge the residue of the lands hereby conveyed from the operation of this mortgage, leaving the said canal and all its equipments, and the said railroad and all its equipments, and the said moneys in the hands and under the management of said trustee, bound and holden for the ultimate payment and redemption of said bonds at their maturity.

ARTICLE VII.

It is further expressly agreed by and between the parties hereto that said party of the second part shall have right to agree with the appraisers hereinbefore provided for, for such reasonable compensation for their services, time, costs, and expenses in and about said appraisement as shall be just and fair, and the said party of the first part will pay the same.

ARTICLE VIII.

And it is further covenanted by the party of the first part, its successors and assigns, that in case of the non-payment of the sums hereby intended to be secured, or of any part thereof, as herein agreed to be paid, at the time or times limited for the payment thereof, or in the payment of the sinking fund as above provided for, after said default shall have continued for the period of six months, and upon the written request of parties or persons or bodies corporate holding at least five hundred of said bonds, it shall and may be lawful for the said party of the second part or its successors, and the party of the first part does hereby authorize and empower the said party of the second part or its successors in office, to take possession of said canal and railroad, and the equipments thereof, and run the same, and use and manage the same, for account of this trust, paying out of the receipts for the
89 use of said canal and railroad, and necessary costs and expenses of running and using the same, and keeping the same in repair, and to grant, bargain and sell to the said canal and railroad above described and hereby mortgaged, with the appurtenances and all the lands and real estate mortgaged or intended so to be herein, and all the personal property, ships, tugs, steamboats, dredges, dumping-scows, excavators or shovelers, railroad cars and locomotives, and all tools and fixtures belonging to said canal and said railroad and its equipment, at public auction or vendue; and on such sale or sales, to make and execute to the purchaser or purchasers all necessary deeds of conveyance pursuant to the statute in such case

made and provided; and out of the money arising from such sale or sales, and from the use of said canal and railroad, to pay off and discharge all said bonds secured or intended to be secured hereby, and the interest on the same, and the costs and expenses of such vendue and sale, rendering the surplus moneys—if any there be—to the said party of the first part, its successors and assigns.

ARTICLE IX.

And the party of the first part doth hereby covenant and agree to and with the said party of the second part, and its successors, that the party of the first — will well and truly pay the said bonds and the interest due and to grow due thereon according to the true tenor thereof, and will pay in the sinking fund as herein provided for, and shall not and will not at any time take, or in any manner use, interpose, or avail itself of any injunction or stay of proceedings or any extension laws, stop laws, valuation laws, redemption
90 laws, or any other laws of the State of Michigan, now in force or which may hereinafter be in force in said State and which may in any way alter, affect, impair or change the right and interests of the holders of said bonds, or of the party of the second part, as herein declared, or which shall in any way impede the mode or manner of realizing or enforcing the said right and interest, or which shall affect or alter the time, place, means or manner of perfecting, enjoying or enforcing any of such rights or interests as the same are herein declared, and that the party of the first part shall and will pay, or cause to be paid, all taxes, charges and assessments imposed or assessed, or which may hereafter be imposed or assessed, upon the said premises, lands, franchises and property hereby mortgaged, and shall and will do at its own proper costs, all things necessary or proper to be done, in order to preserve or make effectual the lien and security created or intended so to be. And the party of the first part hereby covenant for the consideration aforesaid, to execute and deliver to the party of the second part, or its successor, any further reasonable and necessary conveyances or instruments for the said canal and railroad premises, rights, franchises, and property real and personal, or any part thereof, for more fully carrying into effect the intents hereof, and further, that at all times, until said bonds shall be all fully paid, with the interest due and to grow due thereon; the party of the first part, its successors and assigns, will permit the party of the second part, or its agents, clerks or substitutes, freely to inspect all the books of account, memoranda, or other books or reports of such party of the first part, its successors and assigns. And these presents are upon the express condition, that after the payment in full of all the said bonds which shall have been
91 sold or otherwise disposed of and issued, with all the interests due and to grow due thereon, these presents and the estate hereby granted shall cease and be void, and the party of first part shall be immediately and fully reinvested with the said premises hereby granted in law and in fact, and without any entry or other act whatsoever, and that until default shall be made by the said party of the first part, either in the payment of the said bonds, any or either of

them, or in payment of the said interest due or to grow due thereon as aforesaid, or in payment in said sinking fund, or in keeping and observing any of the covenants and agreements herein contained, the party of the first part, its successors and assigns, shall remain in quiet and peaceable possession and enjoyment of the said premises and property herein granted and conveyed.

And it is hereby further mutually covenanted by and between the parties hereto that the party of the second part, its successor or successors, shall only be accountable for reasonable diligence in the management of said trusts, and shall not be responsible for the acts of any agents appointed by it honestly and in good faith, and so far as moneys or other property shall be received by it, it shall only be responsible for such sums of money or property as shall have come into its hands or under its control, and it shall be entitled to receive, and may deduct from any moneys in its hands by reason thereof at any time, all its costs, charges, and expenses and proper compensation for every labor or service performed by it in the execution of the trust hereby created.

In witness whereof the said party of the first part has caused its president and treasurer to subscribe and its secretary to attest
92 this indenture, and has caused its corporate seal to be hereto affixed, and the party hereto of the second part, for the purpose of signifying its acceptance of the trust herein and hereby created, has caused its seal to be hereto affixed and its president to subscribe his name hereto on the day and year first above written.

P. J. AVERY, *President.*
[SEAL.] ALFRED WILD, *Treasurer.*

Attest:
A. VIELE, *Secretary.*
UNION TRUST COMPANY OF NEW YORK,
By J. H. FROTHINGHAM, *President.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this tenth day of May, A. D. one thousand eight hundred and seventy-one, personally came before me Perez J. Avery, of New York, and Augustus H. Viele, of Brooklyn, in the county of Kings and State of New York, and Alfred Wild, of Rhinebeck, in the State of New York, who, being by me each duly sworn, depose and say: That the first is president and the second is secretary and the latter is treasurer of the Lake Superior Ship Canal Railroad and Iron Company, and I certify that they are known to me to be such officers of said company, and they severally acknowledged the execution of the foregoing instrument to be the free act and deed
of said company, and I further certify that I know the seal
93 affixed to said instrument, which purports to be the seal of said company—to be the corporate seal of said company—and on the twelfth day of May, A. D. one thousand eight hundred and seventy-one, before me personally came Isaac H. Frothingham

known to me to be president of the Union Trust Company of New York, who resides in the city of Brooklyn, and he acknowledged the execution of the foregoing instrument to be the free act and deed of the said Union Trust Company of New York; and I further certify that I know the seal affixed to said instrument—which purports to be the seal of said company—to be the corporate seal of the last-named company.

In witness whereof, I have hereunto set my hand and affixed my official seal, this twelfth day of May, A. D. one thousand eight hundred and seventy-one.

[SEAL.] WILLIAM V. ARCHER,
Commissioner of Michigan in New York.

"EXHIBIT B."

Supplemental Deed of Trust.

This indenture made and entered into this fifth day of April, A. D. 1872, by and between the Lake Superior Ship Canal Railroad and Iron Company, a corporation existing under the laws of the State of Michigan, party of the first part, and the Union Trust Company of New York, party of the second part:

Witnesseth, that, whereas, by an indenture or deed of trust executed between the parties hereto, and bearing date the first day of May, in the year of our Lord eighteen hundred and seventy-
94 one, and which said deed of trust or indenture was duly recorded in the counties of Keweenaw, Houghton, Ontonagon, Menominee, and Schoolcraft, in the State of Michigan, and the original indenture is now in the hands of the said party of the second part, the said Union Trust Company of New York.

And whereas, in and by said deed of trust or indenture in article II, of the same, it is provided as follows: "In case that at the end of one year from the date of this deed any of the said sixteen hundred and twenty-five bonds, deposited with said trustee to be used to fund the issues of 1865, 1868, and 1870, as aforesaid, should remain unused in the hands of said trustee, it shall be the duty of said trustee to sell the same as soon as or whenever par and accrued interest shall be offered for the same, and use the proceeds of the same to pay and redeem such of the bonds of the said issues of 1865, 1868, and 1870, as shall not before that time have been presented, redeemed, and cancelled," as by reference to said Article II of said deed of trust will fully appear.

And whereas, also, since the making of said deed of trust, two hundred and fifty of the bonds secured by the deed of trust of 1870, of the par value of two hundred and fifty thousand dollars, have been presented to said Union Trust Company and delivered up and cancelled.

And whereas, it is now deemed advisable by the said Lake Superior Ship Canal Railroad and Iron Company to sell and dispose of the whole issue of bonds secured under and by the deed of trust of which this is a supplement, for such price as the same will
95 bring, provided that sum be sufficient to pay and redeem the

said bonds of the issues of 1865, 1868, and 1870, as the same are set forth in the deed of trust to which this is a supplement, and the interest on the same, and to enable the said Lake Superior Ship Canal Railroad and Iron Company to fulfill all its stipulations in said deed of trust.

And, whereas, also, the whole issue of said bonds, under the deed of trust of which this is a supplement, are negotiated and sold, and will be delivered within ninety days hereof, and upon such sale the said bonds under the respective deeds of trust of 1865, 1868, and 1870, with all unpaid interest upon the same, are to be paid off in full out of the proceeds of such sale:

Therefore, this indenture witnesseth, that the parties hereto do make this indenture a supplement to the indenture, dated May 1st, 1870, and now in the hands of said Union Trust Company, and agree that this supplement shall be attached to said deed of trust, dated May first, 1871, and be read with it, and become a part thereof; and the parties agree as follows: the said Union Trust Company, of New York, shall receive from the parties owning any bonds of the said issues of 1865, 1868, and 1870, their bonds and the coupons attached to the same or detached therefrom, with a statement of the amount due upon said bonds and coupons, with interest at the same rate as that of the bonds added upon said coupons from the date they become due, and shall issue a certificate to said holder or holders for the same, providing that said sums due for said bonds, coupons, and interest are to be paid out of the proceeds of the sale of said bonds, secured by said deed of trust, to which this is a supplement in full, and that if the same are not paid in ninety days,
96 said Trust Company will redeem the same to the original holder thereof, and that during the said ninety days the said Union Trust Company will suffer nothing to be done with said bonds to impair the security of the same, or to the injury or damage of the parties owning and depositing the same.

And it is further agreed that the said Union Trust Company, of New York, shall receive from any individual or individuals or bodies corporate any said bonds of either of said issues of 1865, 1868, and 1870, or of the issues under the deed of trust of which this supplementary, and which bonds are held by the individuals or bodies corporate presenting the same, as collateral security for any loan or loans, with a statement of the sum due upon said loan or loans, with the interest due on the same up to the date of such presentation certified by the party in whose name or by whom said loans were made, and said Union Trust Company shall issue a certificate to such party presenting said securities, that said Trust Company will hold the same for payment out of the proceeds of sales of said bonds under the deeds of trust to which this is a supplement, and if said bonds are not sold in ninety days from the first day of May, A. D. 1872, and the claims of said parties paid in full therefrom, with interest to the date of payment, said Trust Company will return the said security to the party or parties depositing the same, and that, in the meantime, the Union Trust Company will not allow anything to be done with said securities to im-

pair their value or lessen the security of the parties depositing the same therein.

In witness whereof the said party of the first part has caused
97 its president and treasurer to subscribe and its secretary to attest this indenture, and has caused its corporate seal to be hereto affixed; and the party hereto of the second part, for the purpose — signifying its acceptance of the trusts herein and hereby created, has caused its seal to be hereto affixed and its president to subscribe his name hereto on the day and year first above written.

(S'g'd) P. J. AVERY,
President.

[SEAL.] (S'g'd) ALFRED WILD,
Treasurer.

Attest: (S'g'd) A. VIELE,
Secretary.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 8th day of April, 1872, personally came before me Perez J. Avery, the president, Alfred Wild, the treasurer, and Augustus H Viele, the secretary of the Lake Superior Ship Canal Railroad and Iron Company, with all of whom I am personally acquainted, and the said Augustus H. Viele being by me duly sworn, said that he resided in the city of Brooklyn; that he was the secretary of the said Lake Superior Ship Canal Railroad and Iron Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was so affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company; and the said Augustus H. Viele further said that he was
98 acquainted with Perez J. Avery and Alfred Wild, and knew them to be the president and treasurer of said company; that the signatures of the said Perez J. Avery and Alfred Wild subscribed to the said conveyance were in the genuine handwritings of the said Perez J. Avery and Alfred Wild, and were thereto subscribed by the like order of the said board of directors and in the presence of him, the said Augustus H. Viele, for the purposes therein mentioned.

In witness whereof, I have hereto set my hand and affixed my official seal, this eighth day of April, A. D. 1872.

[SEAL.] (S'g'd) P. J. GAGE,
Notary Public, N. Y. City and Co.,
229 Broadway, N. Y., No. 36.

99 THE UNITED STATES OF AMERICA, }
Western District of Michigan, Northern Division, } *ss:*

The President of the United States of America to the Union Trust Company of New York, George Jerome, and Fernando C. Beaman, assignees in bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, who are citizens of the State of Michigan, Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, citizens of the State of New York, and Frederick S. Ayer, who is a citizen of the State of Massachusetts, Greeting:

We command you and every of you that you appear before our

judge of our circuit court of the United States of America for the western district of Michigan, at Marquette, in said district, on the first Monday in the month of September next, to answer the bill of complaint of Morris Richter, of St. Louis, in the State of Missouri, and who is a citizen of the State of Missouri, this day filed in the clerk's office of said court, in said city of Marquette, then and there to receive and abide by such judgment and decree, as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of Michigan to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Marquette aforesaid, this 17th day of July, in the year of our Lord one thousand eight hundred and eighty-two.

GAD SMITH,
Deputy Clerk.

Memorandum.

The within-named defendants notified that unless you enter your appearance in the clerk's office of said court, at Marquette aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against you as confessed, and a decree entered accordingly.

GAD SMITH,
Deputy Clerk.

99½ WESTERN DISTRICT OF MICHIGAN, } *ss:*
Northern Division, }

I hereby certify and return that, after diligent search, I am unable to find any of the within-named defendants in my district, and that — have no place of residence in said district.

Dated Sept. 5th, 1882.

JACOB DOEF,
Deputy U. S. Marshal.

[Endorsed:] No. —. Circuit court of the United States, western district of Michigan, northern division. ———, complainant, *vs.* ———, defendant. Chancery subpœna. Returnable to rule day first Monday in ———, A. D. 188 . Filed ———, A. D. 188 . ———, clerk. ——— compl'ts sol'r.

To the marshal:

The marshal will serve this subpœna and notice for a writ of injunction personally upon each of the defendants, or in case any of them cannot be found, then serve on such by leaving a copy thereof at the dwelling house or usual place of abode of such defendant with some free white person who is a member or resident of the family of suitable age and discretion.

—— ——, *Compl't's Sol'r.*

100 Circuit Court of the United States for the Northern Division of the Western District of Michigan.

MORRIS RICHTER, Complainant,

vs.

THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME AND Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, and Frederick S. Ayer, Defendants.

NORTHERN DIVISION OF THE WESTERN DISTRICT OF MICHIGAN, *ss:*

Joseph P. Whittimore, of Detroit, Michigan, being duly sworn, deposes and says: That the bill of complaint in the above entitled cause was filed in said court on Monday, the 17th day of July, 1882, and subpœna duly issued thereon and delivered to the deputy marshal of said district for service on that day; and that the object of said bill of complaint is to charge with and enforce an equitable lien upon said property within this district when said suit is brought, and that each and every of the said defendants in said suit is not an inhabitant of this district where said suit is brought, but that said The Union Trust Company of New York is a citizen of New York, doing business in the city of New York, where also the defendants, Josephine Ayer, Leslie Josephine Ayer, and Henry Ayer reside, as this deponent is informed and believes; and that the said Frederick S. Ayer, defendant, is a citizen of the State of Massachusetts,
101 residing in Boston, in said State of Massachusetts, as this deponent is informed, and also verily believes. That the defendants, George Jerome and Fernando C. Beaman, are inhabitants of and reside in the eastern district of Michigan. Wherefore, in behalf of said complainants, this deponent, as solicitor, applies to this court for the usual order in such cases directing the absent defendants to plead, answer, or demur to said bill on or before the September rule day of this court.

Deponent further says: That the real property sought to be charged by said bill of complaint is wild land and not in the actual possession of any one, as deponent is also informed and believes; & further saith not.

JOSEPH P. WHITTIMORE.

Subscribed and sworn before me, this 18th day of July, A. D. 1882.

GAD SMITH,
Deputy Clerk.

Filed July 18, 1882.

GAD SMITH,
Dep. Clerk.

102 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

MORRIS RICHTER, Complainant,

vs.

THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, and Frederick S. Ayer, Defendants.

At a session of the said circuit court of the United States held for said district at the court-house in Marquette, the 18th day of July, A. D. 1882.

Present: Hon. S. L. Withey, district judge.

On motion of J. P. Whittimore, of counsel for complainant in the above-entitled cause, and on reading and filing affidavits of said Whittimore, showing that suit had been commenced in the above-entitled cause, and that the object of such suit was to charge with an equitable lien real property situate within said district, and that none of said defendants are inhabitants of the said district in which said suit is brought, it is ordered that each and every of said absent defendants appear to and plead, answer or demur, to said bill of complaint on or before the 5th day of September, A. D. 1882,
103 and that a copy of this order be served personally upon each of said defendants at least ten days before said return day, wherever the said defendants or each one may found.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Gad Smith, deputy clerk of the United States circuit court for the sixth circuit and western district of Michigan, northern division, do hereby certify that the foregoing is a copy of an order made and entered in said court in a cause therein entitled; that I have compared the same with the original of said order, and that it is a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of said court, at Marquette, this 19th day of July, A. D. 1882.

[SEAL.]

GAD SMITH,
Deputy Clerk.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that on the 25th day of July, A. D. 1882, I served the within order on George Jerome, within named, at Detroit, in said district, by delivering to him personally a true copy thereof, also exhibiting this order with the seal of the court impressed thereon.

S. S. MATHEWS,
U. S. Marshal,
By C. P. TAYLOR, *Deputy.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 26th day of July, A. D. 1882, I served the within order on Fernando C. Beaman at Adrian, in said district, by exhibiting to him said order, showing the seal of the court impressed thereon, and delivering to him personally a true copy thereof.

S. S. MATHEWS,
U. S. Marshal,
By J. R. BENNETT, *Deputy.*

Filed Feb'y 26, '82.

GAD SMITH,
Dep. Clerk.

104 UNITED STATES OF AMERICA.

May Term, Thursday, July 18, A. D. 1882.

Court met pursuant to adjournment.
Present: Hon. Solomon S. Withey, district judge.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, and Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, and Frederick S. Ayer, Defendants.

On motion of J. P. Whittimore, of counsel for complainant in the above-entitled cause, and on reading and filing affidavit of said Whittimore showing that suit has been commenced in the above-entitled cause and that the object of such suit was to charge with an equitable lien real property situate within said district and that none of said defendants are inhabitants of the said district in which said suit is brought: It is ordered that each and every of said absent defendants appear to and plead, answer, or demur to said bill of complaint on or before the 5th day of September, A. D. 1882, and that a copy of this order be served personally upon each of said defendants, at least ten days before said return day, wherever the said defendants or each of them may be found.

105 WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Gad Smith, deputy clerk of the United States circuit court for the sixth circuit and western district of Michigan, northern division, do certify that the foregoing is a copy of an order made and entered in said court in a cause therein entitled; that I have compared the same with the original of said order and that it is a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of said court, at Marquette, this 19th day of July, A. D. 1882.

[SEAL.]

GAD SMITH,
Deputy Clerk.

106 STATE OF NEW YORK, } *ss:*
City and County of New York, }

Patrick J. Flemming, being duly sworn, says: That he is of the age of twenty-one years and over; that on the 22d day of August, 1882, at No. 73 Broadway, in the city of New York aforesaid, he served on A. J. Ronaldson, the secretary of the Union Trust Company of *the* New York, a copy of the annexed order by handing the said copy to and leaving it with him, at the same time showing him the annexed certified copy under seal; that he knew the person so served to be the secretary of said company.

PAT'K J. FLEMMING.

Sworn before me, this 23d day of August, 1882.
[SEAL.] WM. CALDWELL,
Notary Public, Kings Co.

Filed Nov. 24, 1882. GAD SMITH,
Dep. Clerk.

107 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Chancery.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company; Josephene Ayer, Lester Josephene Ayer, Henry Ayer, and Frederick F. Ayer, Defendants.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Joseph P. Whittimore, of Detroit, in said district, being duly sworn, deposes and says: That he is informed by the affidavit of Pat'k J. Flemming, herewith filed, & believes true, that the order of appearance of the defendant, The Union Trust Company of New York, herewith filed, has been duly served as required by said order upon said The Union Trust Company of New York, and that said defendant has not appeared nor served this deponent, who is solicitor for complainant in above-entitled cause, with notice of appearance, nor with plea, answer, or demurrer in the above-entitled cause, as required by said order, or otherwise, & further deponent says not.

J. P. WHITTIMORE.

Sworn and subscribed before me, this 22 day of November, A. D. 1882.

WALTER S. MARSH,
Clerk of Circuit Court U. S., East. Dist. Mich.

1 DETROIT, *November 22d*, 1882.

On filing the foregoing affidavit and proof — service of order for appearance herewith sent you. Please enter default and rule *pro*

confesso of the defendant, The Union Trust Company of New York, in the foregoing-entitled cause.

J. P. WHITTIMORE,
Compl't's Sol'c'r.

To the clerk of said court.

Filed Nov. 24, 1882.

GAD SMITH,
Dep. Clerk.

109 The Circuit Court of the United States for the Western District of Michigan, Northern Division. In Chancery.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, and Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, and Frederick F. Ayer, Defendants.

On filing due proof of the personal service of a certified copy of the order heretofore, to wit, on the 18th day of July, A. D. 1882, made by Hon. G. S. Withey, district judge, requiring the said defendants to appear, plead, demur, or answer to the complainant's bill of complaint herein on or before the 5th day of September thereafter upon The Union Trust Company of New York, and the time limited in said order for its appearance having expired, and said defendant, the Union Trust Company of New York, not having appeared therein nor answered, plead, or demurred to said bill of complaint, on motion of J. P. Whittimore, solicitor for said complainant, it is ordered that the bill of complaint in said cause be, and the same is hereby, taken as confessed by the said The Union Trust Company of New York.

Marquette, November 24, 1882.

J. P. WHITTIMORE,
Sol'c'r for Complainant.

110 The Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, AND Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, Frederick F. Ayer, Henry Ayer, Josephine Ayer, and Leslie Josephine Ayer and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, Trustees under the Will of Jame- C. Ayer, deceased, Defendants.

In this cause, on motion of Meddaugh, Driggs & Harman, solicitors for all of said defendants, except The Union Trust Company of New York and Fernando C. Beaman, assignee, it is ordered that the

appearance of said defendants, with the exception of said Trust Co. and said Beaman be, and is hereby, entered.

Dated January 25, 1883.

MEDDAUGH, DRIGGS & HARMAN,
Sol'ors for Defts, as above stated.

111 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Chancery.

MORRIS RICHTER
vs.
UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME AND FERNANDO C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company; Frederick F. Ayer, Henry Ayer, Josephine Ayer, and Leslie Josephine Ayer; and Frederick Ayer, Benjamin Dean, and Jacob Rogers, Trustees under the Will of James C. Ayer, deceased.

The demurrer of George Jerome, assignee in bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company, Frederick F. Ayer, Henry Ayer, Josephine Ayer, and Leslie Josephine Ayer and Frederick F. Ayer, Benjamin Dean and Jacob Rogers, trustees under the will of James C. Ayer, deceased, defendants, to the bill of complaint of Morris Richter, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant had not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought or prayed for from or against these defendants: Wherefore these defendants
112 demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

MEDDAUGH, DRIGGS & HARMAN,
Solicitors for the Defendants.

GEORGE JEROME,
Assignee, &c., Frederick F. Henry, Josephine and Leslie Josephine Ayer and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, Trustees of, &c.
E. W. MEDDAUGH, *Counsel.*

I, E. W. Meddaugh, counsel for the defendants named in said demurrer, do hereby certify that, in my opinion, the same is well founded in point of law.

E. W. MEDDAUGH.

STATE OF MICHIGAN AND EASTERN DISTRICT THEREOF, *ss:*

George Jerome, assignee in bankruptcy of the Lake Superior Ship

Canal Railroad and Iron Company, defendant above named, being duly sworn, says that the foregoing demurrer is not interposed for delay.

GEO. JEROME.

Subscribed and sworn to, this 23d day of January, A. D. 1883, before me.

L. C. STANLEY,
Notary Public, Wayne County, Michigan.

Filed January 23, 1883.

GAD SMITH,
Dep. Clerk.

113 THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Northern Division, }

In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Equity.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, and Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company; Josephene Ayer, Leslie Josephene Ayer, Henry Ayer, and Frederick F. Ayer; and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, Trustees under the Will of James C. Ayer, deceased, Defendants.

To the Honorable Solomon L. Withey, judge of said court:

The petition of Morris Richter, complainant in said above-entitled cause, shows unto your honor that heretofore, to wit, in the May term, 1882, of this court your petitioner filed his original bill making parties thereto defendant the above-named defendants, except the last three above named, and procured an order of court requiring the absent defendants to appear, which order was duly served on the defendant, The Union Trust Company of New York, and George Jerome and Andrew C. Beaman, assignees, and the said bill was taken as confessed by the said The Union Trust Company of New York.

114 That on the 31st day of October, A. D. 1882, the said bill was amended, making parties thereto the said last-named defendants, trustees; to which said bills and the orders thereon *and the orders thereon,* and the proof of service of the same, as they appear by the files of this court, your petitioner prays reference for greater certainty and particularity.

That on the 22d day of January last your petitioner's solicitor in said cause was served with notice from E. W. Meddaugh, Esq., one of the solicitors of this court, of his having duly entered the appearance in said cause of all of the above-named defendants except the said The Union Trust Company of New York and Fernando C. Braman, and at the same time said Meddaugh served said solicitor with a general demurrer of all the defendants for whom said Med-

daugh appeared as aforesaid for want of equity in the case made by said bill.

And your petitioner is advised by his solicitor and counsel that it is proper and necessary that said bill of complaint should be further amended before going to hearing on said demurrer in the following particulars, wherein your petitioner prays leave to amend said bill upon such terms as to your honor shall seem meet:

1st Amendment. In the 3d line from the top of the first page of said bill after the words "brings this bill of" insert the words "complaint," and erase the words "supplement in the nature of a bill of review and cross-bill."

2d Amendment. On page 9 of the bill after the word "coupons" at the end of the 10th line from the bottom of the said page
115 amend by inserting the words "a copy of which mortgage and of the signatures and amendments thereof as hereto annexed and marked Schedule *Ca.*" Also by annexing such copy as a schedule of said bill and marked accordingly.

3d Amendment. On page 15 of the bill at the 2d line from the top erase the word "only," and in 3d line from top after the word "paid" insert the words "to your orator."

On page 20 of the bill 3d line from the bottom erase the word "after" & insert the word "before."

4th Amendment. On page 27 of the bill in the 14th line from the top amend by erasing the words "come in upon the foot" and insert in lieu thereof the words "have the benefit."

5th Amendment. On page 27, in the 12th line from the bottom, erase the word "further."

6th Amendment. On page 28, at the 8th line from the top, after the word "cause," insert the words following, viz: "Or that the said residue of said wagon road lands be charged by the decree of this court, in addition to the amount of principal and interest due upon said bonds and coupons, with the amount expended by said James C. Ayer in procuring the legal title from the State of Michigan, with interest thereon, as that amount shall be ascertained and reported by such master, and that on payment of such amount of principal and interest to the defendants who now hold said legal title (which sum your orator is ready and willing and hereby offers to pay as this court shall direct) the said last-named defendants
116 be decreed and directed to convey said lands to a receiver to be appointed by this court to be sold under the direction of a master thereof, to satisfy both said sums so to be charged thereon as herein prayed."

And your petitioner will ever pray, &c.

MORRIS RICHTER.

J. P. WHITTIMORE,
Solicitor & of Counsel for Pl'ff, Petitioner.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 7th day of February, A. D. 1883, personally appeared before me, the undersigned, a notary public in and for the county of Wayne, in the State of Michigan, Morris Richter, petitioner in the

foregoing petition, and signed by him, who, being by me duly sworn, did depose and say: That he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOS. P. WHITTIMORE, JR.,
Notary Public, Wayne County, Michigan.

On reading the foregoing petition, on motion of J. P. Whittimore, of counsel, it is ordered that the said plaintiff have leave to amend the amended bill on file in the above-entitled cause, as prayed in said petition, on payment of ten dollars costs to E. W. Meddaugh, said defendants' solicitor; order further, that a copy of such
117 amended bill be served on defendants' solicitor on or before March 5th next.

Feb'y 21, 1883.

S. L. WITHEY,
Judge of said Court.

Service of copy foregoing petition & order is admitted, this 22d February, A. D. 1883, & payment of the $10 required by said order is hereby waived.

MEDDAUGH, DRIGGS & HARMAN,
Sol'rs for Certain Deft's.

Filed Feb'y 21, '83.

GAD SMITH,
Dep. Clerk.

118 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Equity.

MORRIS RICHTER
vs.
GEORGE JEROME and FERNANDO C. BEAMAN, Assignees JOSEPHINE Ayer, Leslie Josephine Ayer, Henry Ayer, Frederick F. Ayer, and Benjamin Dean, Frederick F. Ayer, and Jacob Rogers, Trustees of, &c.

It is hereby stipulated that the demur-er heretofore filed stands as a demur-er to complainant's amended bill of complaint, and be considered in all respects as if in form a demur-er to said amended bill.

March 8, 1883.

J. P. WHITTIMORE, *Pl'ff's Solicitor.*
MEDDAUGH, DRIGGS & HARMAN,
Sol'rs for Def'ts, except Trust Co. and Brown.

Filed March 12, 1883.

GAD SMITH,
Dep. Clerk.

119 In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division, on the 28th day of November, A. D. 1883, and of the Independance of the United States of America the one hundred and eighth. In Equity.

Present: The Honorable Solomon L. Withey, district judge.

MORRIS RICHTER, Complainant,

vs.

THE UNION TRUST COMPANY OF N. Y., GEORGE JEROME, and FERNANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company; Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, Frederick F. Ayer; and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, trustees, under the will of James C. Ayer, deceased, Defendants.

This cause was heretofore, on the 22d day of November, 1883, submitted to the court upon the demurrer to the bill of complaint filed herein, and counsel having been heard for the respective parties:

It is ordered that said demurrer be, and is hereby, sustained, and that said bill of complaint be, and is hereby, dismissed, and that the defendants recover their costs, to be taxed, including a solicitor's fee of twenty dollars.

Dated Grand Rapids, November 28, 1883.

S. L. WITHEY,
Dist. Judge.

Filed Nov. 28, 1883. H. M. HUISDILL, *Clerk.*

120 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Equity.

MORRIS RITCHER, Compl't,

vs.

THE UNION TRUST COMPANY *et al.*, Defts.

The annexed copy bill of complaint was read on the argument of the demurrer in this cause, and treated as if it were the original on file in the circuit court for the eastern district of Michigan, and as made a part of complainant's bill in this cause by reference in said bill thereto; and as constituting in connection with Schedule C*a* of the last-named bill a complete transcript of the foreclosure bill of the Union Trust Company upon which the decree, "Schedule D," of the bill in this cause was founded.

S. L. WITHEY, *Dist. Judge.*

121 Circuit Court of the United States for the Eastern District of Michigan. In Equity.

The Union Trust Company of New York, a corporation created under the laws of the State of New York, and which is a citizen of the State of New York, having its business office in the city of New York, exhibits this its bill against the Lake Superior Ship Canal

Railroad and Iron Company, a corporation created under the laws of the State of Michigan, and which is a citizen of the State of Michigan, and has its principal place of business in and is a resident of the eastern district of said State, and against George Jerome, of Detroit, in the State of Michigan, and Fernando C. Beaman, of Adrian, in said State, and who are both citizens of said State and residents of said eastern district, and assignees in bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, bankrupt, appointed by the district court of the United States for the eastern district of Michigan.

And thereupon complainant says:

1st. That on or about the first day of May, in the year of our Lord one thousand eight hundred and seventy-one, said bankrupt, The Lake Superior Ship Canal Railroad and Iron Company, a corporation created under the laws of the State of Michigan, in order to take up its prior bonded indebtedness of three issues, build a railroad to its "iron fields," and pay its floating debt, resolved to issue three thousand five hundred (3,500) bonds, of one thousand dollars ($1,000) each, payable in thirty (30) years from said date, with interest at 7.3 per cent., payable semi-annually, May 1st and November 1st, principal and interest payable in gold, at the Union Trust Company of New York.

2nd. That thirteen hundred of such bonds were duly issued
122 by said bankrupt company and sold, pledged, or disposed of in some other way by said bankrupt, amounting at par to one million three hundred thousand dollars.

3rd. That twenty-two hundred of said bonds are in the custody of complainant not issued, amounting at par to twenty-two hundred thousand dollars.

4th. That said 1,300 bonds are outstanding in the hands of *bona fide* holders for value, and said bonds are now in the possession of the said bondholders, beneficiaries of complainant, and ready to be proved in this honorable court.

5th. That the said bankrupt, on the day aforesaid, authorized its president and treasurer, in the name of said company, bankrupt, and under its seal, in order to secure to the holders of said bonds the payment of the same, together with the interest thereon, in manner aforesaid, to execute and deliver to complainant a certain trust deed, in legal effect equivalent to an indenture of mortgage, bearing date the same day and year last aforesaid, and thereby, for the security of said bonds, to be numbered from one to 3,500, the party of the first part in and to said indenture or mortgage did grant, bargain, sell, release, enfeoff, and confirm unto complainant, said Union Trust Company of New York, the party of the second part in the indenture, and its successors, all the said bankrupt company's canal in Michigan, described to be twenty-four miles long, together with the franchise of the company connected with the same; and also six hundred thousand acres of land, described to be owned by the bankrupt company, in the State of Michigan; and also its railroad proposed to be constructed from the property called "Iron Fields," and the personal property and franchises of the said proposed railroad; all which

property is more particularly described in a true copy of said mortgage, hereto attached, and forming a part hereof, marked Exhibit "A."

123 6th. To have and to hold the above-bargained property to the said party of the second part and its successors.

And the said indenture of mortgage was upon certain express trusts specifically set forth and distinctly described in articles numbered I to IX, inclusive, as appears more fully by said copy marked Exhibit "A," hereto attached.

Art. I appropriates 1,625 bonds to retiring the prior issue of said bankrupt's bonds of 1865, 1868, and 1870 at fifty cents.

Art. II provides for the sale of any of said bonds last named remaining unused at the end of one year, and the use of the proceeds for the redemption of bonds not retired.

Art. III sets apart 1,000 bonds to raise money with which to build the proposed railroad.

Art. IV provides for the annual deposit of two per cent. on the face of the issue as a sinking fund for the ultimate payment of the principal.

Art. V provides for sales by the company of lands to be released from the lien of the mortgage, and the proceeds used for application on the principal.

Art. VI gives details for retiring bonds.

Art. VII provides for paying appraisers with a view to selling land.

Art. VIII provides that in case of default in paying interest the trustee, to wit, complainant, upon the written request of parties holding at least five hundred of said bonds, shall sell the mortgaged property and pay principal and interest of the outstanding bonds.

Art. IX contains provisions in regard to not taking advantage of stay laws, allowing inspection of books, and makes other miscellaneous provisions, as in and by the said indenture of mort-

124 gage, duly made and executed by the said bankrupt company, by its president and treasurer, and attested by its secretary, and executed under its seal, will more fully and at large appear.

7th. That afterwards, to wit, on the tenth day of May, in the year of our Lord one thousand eight hundred and seventy-one, the execution of said indenture of mortgage was duly acknowledged by the said president, secretary, and treasurer, before William V. Archer, then a commissioner for Michigan, in New York, duly authorized and empowered to take acknowledgment of deeds, as will, on reference to the certificate of acknowledgment endorsed thereon, signed by said William V. Archer, more fully and at large appear.

8th. That afterwards, in the year of our Lord one thousand eight hundred and seventy-one, the said indenture of mortgage, together with the certificate of acknowledgment thereof, was in due form of law recorded in the office of the register of deeds in the several counties in the upper peninsula of Michigan, where said lands lie, as the record of said indenture of mortgage, now remaining in said offices

of the said counties, as by certificates of the registers of said counties at the time last mentioned, endorsed on the said indenture of mortgage and signed by the said registers, sufficiently appears, and to which said records and certificates thereof complainant, for greater certainty, prays leave to refer.

9th. That said canal in said mortgage mentioned was completed about October, A. D. 1873, by a receiver appointed by this court to save 400,000 acres of said land from reverting to the United States Government, and that said receiver, under the order of this court, has created two first liens on said canal, and the real and per-
125 sonal property and the franchise of said company, by the issue of two series of receiver's certificates, the first $500,000, and interest from July 1, 1872, at ten per cent., on which more than $600,000 is now due and unpaid; and the second series for $137,300 and interest from May 1, 1874, and interest at ten per cent.

That said canal franchises and said 400,000 acres of land are also subject to the lien of three deeds of trust held by John L. Sutherland, Lucien Birdseye, and Thomas L. McCarter, respectively, and securing, respectively, issues of bonds of 1865, 1868, and 1870, except 250 bonds of the latter issue, which have been retired by complainant, and which are the only bonds of any of said issue which have been retired. That the outstanding bonds of the said three prior issues, amounting at par to two millions of dollars, besides accrued interest at ten per cent. on the issue of 1865 and 1868, and seven per cent. on that of 1870, were in foreclosure prior to the bankruptcy of said company in this court. That the first two issues are not yet in decree, but that a decree of foreclosure and sale was rendered upon said McCarter mortgage on the 15th day of June, A. D. 1874, for the sum of $1,507,686.37, subject to the said Sutherland and Birdseye bonds and mortgages and receiver's certificates.

That of the 200,000 acres mortgaged to the complainant, in addition to said 400,000-acre land grants, it is claimed that said company has no title, save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder has been patented to other parties. Complainant annexes hereto a list of said last-named lands, to wit, of said $47{,}958\frac{85}{100}$ acres, marked Exhibit "C."

Complainant is informed and believes that said lands are worth about $3.00 per acre, or about $150,000; that said lands are
126 known as the "wagon road lands," and were acquired from the State of Michigan by one Francis W. Anthony, and were conveyed to said bankrupt company mortgagee. Exhibit "C" is a copy of the list on file in the office of the secretary of State of Michigan, being certificate of purchase No. 1 of military road land under act No. 20 of the laws of 1864, approved February 4th. That March 4th, 1873, Henry S. Wells, a bondholder secured by complainant's said mortgage, filed his bill in this court, impleading, among others, said Francis W. Anthony, said assignees, and this complainant, and sought by said bill to subject the said "wagon road lands," other than said $47{,}958\frac{85}{100}$ acres, to the lien of complainant's mortgage, and to prevent their conveyance by the State to third parties, and afterwards such proceedings were had that the relief sought was de-

nied. That in article ten of a cross-bill, filed by said assignees in this court September 13th, 1873, said assignees state that certain stockholders of said bankrupt had contracted to buy lands to the amount of 200,000 acres, parcel of a larger amount granted by the State of Michigan for the construction of a military wagon road, and, assuming to be owners, had conveyed the same to the said bankrupt; that said grantors had acquired title to only about 49,000 acres, and only about that amount became vested in said bankrupt, and that the residue had been patented by the State of Michigan to other parties and lost to said corporation, and that said assignees made the same statement substantially in their answer to a bill by this complainant to foreclose said mortgage in the said district court, which bill was discontinued.

10th. That said company executed to complainant a certain supplementary deed of trust on or about the 8th day of April, A. D. 1872, to carry out the provisions of article II above, and in
127 the unwarranted expectation of retiring all its said bonded debt of 1865, 1868, and 1870 within ninety days from that date, but that nothing was accomplished under said supplementary deed of trust, a copy of which is hereto attached and marked Exhibit "B"; that a number of the bonds of 1865 and 1868 were deposited with the complainant under said supplementary deed, but that none of said bonds were taken up, as provided for in said instrument, and that said bonds are subject to the order of their owners, who deposited them, the object of said supplementary deed having wholly failed.

11th. That said bankrupt company has made default in the payment of the interest of the sum secured by said deed of trust or mortgage, and, in fact, has made no payment since said bonds were issued, and that said default has continued for over six months last past, and that complainant holds the written request of holders of more than 500 of said issue of 1,300 bonds, parcel of said 3,500 bonds, desiring complainant to foreclose said deed of trust and cause the aforesaid property described in said deed of trust to be sold, and that thereupon, under the provisions of said mortgage to complainant, it became its duty to foreclose.

12th. That the said mortgagor corporation, The Lake Superior Ship Canal Railroad and Iron Company, was adjudicated a bankrupt, on a creditor's petition in the district court for this district on or about the 27th day of August, A. D. 1872; and thereafter, the creditors having failed to elect, the said district court appointed said defendants, George Jerome and Fernando C. Beaman, to be assignees of said bankrupt, on or about the third day of December, A. D. 1872, in whom all the property of said bankrupt has vested, subject to the lien of said receiver's certificates of indebtedness, and also to the deed of trust executed by said bankrupt, securing said bond,
128 issues of 1865, 1868, and 1870, to which three issues complainant's deed of trust is made expressly subject by the terms thereof, and also subject to the lien of complainant's said deed of trust, securing said 1,300 bonds of the par value of one million three hundred thousand dollars.

13th. That on or about the 18th day of August, A. D. 1874, complainant filed its petition in the said district court in the matter of the bankruptcy of the said mortgagor corporation, and prayed leave to foreclose its said mortgage in this court or in the proper State court, as it might elect; that said assignees answered said petition; and afterwards, on the 18th day of September, A. D. 1875, said district court granted the prayer of said petition, and that thereupon said assignees filed their petition of review in this court to review and reverse the order granting said prayer; that complainant answered said petition of review; and afterwards this court, on the 13th day of February, A. D. 1875, by its order, affirmed the order of said district court, in so far as it granted leave to foreclose in this court, as by true copies of the said petition, answer, and order in the district court, and of the said petition of review, answer, and order in this court, to be hereafter produced and proved, will fully appear.

14th. That in and by the acts of Congress set forth in said mortgage to complainant, a copy of which is hereto annexed, the two land grants of two hundred thousand acres each, granted to said State and conferred upon said corporation and covered by said mortgage, were to be selected by said State from any lands in the upper peninsula of said State subject to private entry, and that said
129 State, by its agents appointed by its Governor, duly made its selections in the General Land Office; which selections were duly certified by the proper officers of the State; and for descriptions of the lands so selected, granted, and mortgaged, reference is hereby made to the selection lists of record in the General Land Office, the land office at Marquette, and the State land office, and also to the same lists on file in this court in the said cause of Thomas N. McCarter against said corporation; that said lands so selected are located in the various counties of the upper peninsula aforesaid, and that all of said 400,000 acres are situated in the eastern district, except those lying in the counties of Menominee and Delta, which are in the western judicial district; that said $47{,}958\frac{85}{100}$ acres of other lands, subject to complainant's mortgage, are also situated in said upper peninsula and in the said eastern district, except, perhaps, a small portion in the western district; that complainant's mortgage is the first and only lien on said last-described lands, but is the last and fourth lien on said 400,000 acres of granted land.

Prayer.

Complainant therefore seeks the aid of this court in equity, and prays as follows:

1. That an account may be taken of the several amounts due the several holders of said bonds and interest warrants, as well for principal as for interest that has accrued and remains unpaid.

2. That said mortgage to complainant be foreclosed, and that the said canal franchise, chattels, and 400,000 acres of granted lands, may be sold subject to the lien of the said receiver's certificates, and bond issues of 1865, 1868, and 1870, secured by mortgages aforesaid; and that said $47{,}958\frac{85}{100}$ acres of land known as "wagon

130 road land" may also be sold; and that all the estate, right, title, and interest of the defendants in the rest and residue of said 200,000 acres of wagon road lands may be sold; and that the defendants herein named, and each of them, and all persons claiming or to claim from or under them, or either of them, may be foreclosed and barred of and from all equity of redemption and claim of, in, and to said mortgaged property, and every part and parcel thereof, with the appurtenances; and that the said defendants and all persons claiming and to claim under them, or either of them, or who have come into possession of the said mortgaged premises, or any part or portion thereof, during the pendency of this suit, deliver and yield up possession thereof to the complainant, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her, or their producing to him or them or to the person or persons in possession of the said mortgaged premises, or any part thereof, the deed or deeds executed by the master, pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute.

3. That from the proceeds of such sale, after payment of the costs and expenses of this suit and a proper compensation to this complainant for the execution of this trust, the holders of said bonds so secured by said mortgage may be paid the amount that may be found to be due to them respectively.

4. That said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, may answer all and singular the premises, but not under oath, which is hereby expressly waived.

131 5. That the complainant may have such further and other relief in the premises *and* the nature and circumstances shall require and to your honors shall seem meet.

6. May it please your honors to grant unto complainant a writ of subpœna, to be directed to the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company, and to the said Lake Superior Ship Canal Railroad and Iron Company, commanding them, at a certain time, and under a certain penalty therein to be limited, to be and appear in this honorable court, then and there to answer the premises and to abide the order and decree of the court therein.

UNION TRUST COMPANY OF N. Y.,
By EDWARD KING.

ALFRED RUSSELL,
Solicitor of Counsel for Com't.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Edward King, being duly sworn, doth depose and say: That he is the president of the Union Trust Company of New York, the plaintiff in the foregoing bill named, and has read the same and knows the contents thereof, and that the said bill is true as to those matters

which are therein stated to be matters of record, and as to all other facts therein stated he believes them to be true.

EDWARD KING.

Subscribed and sworn before me by Edward King, this 15th day of June, 1875.

DANIEL SEYMOUR,
Notary Public (70), *N. Y. Co.*

I hereby acknowledge myself security for all costs for
132 which complainant may become liable.
Detroit, 19 June, 1875.

ALFRED RUSSELL.

Filed December 31st, 1883.

GAD SMITH,
Deputy Clerk.

133 United States Circuit Court for the Northern Division of the Western District of Michigan. In Equity.

MORRIS RICHTER, Complainant,

v.

THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, Survivor of George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company; Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, and Frederick F. Ayer; and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, Trustees under the Will of James C. Ayer, Deceased.

Know all men by these presents that we, Morris Richter, as principal, and Paul Ullrich and Frederick G. Kendrick, both of Mount Clemens, as sureties, are held and firmly bound unto the above-named defendants in the sum of one thousand dollars, to be paid to them, their executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, or administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of December, A. D. 1883.

Whereas the above-named Morris Richter is about to take an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause on the 30th day of November, A. D. 1883, by the aforenamed circuit court:

Now, therefore, the condition of the foregoing obligation is such, that if the said Morris Richter shall prosecute his said appeal to effect, and answer all costs and damages awarded on such appeal if he shall fail to make good his appeal, then the foregoing obligation shall be void; otherwise of force.

MORRIS RICHTER. [SEAL.]
PAUL ULLRICH. [SEAL.]
F. G. KENDRICKS. [SEAL.]

134 EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 22nd day of December, A. D. 1883, before me, the subscriber, personally came Morris Richter, Paul Ullrich, and Frederick G. Kendrick, to me known to be the persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

G. M. CROCKER, [SEAL.]
Notary Public, Macomb Co., Mich.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Morris Richter, Paul Ullrich, and F. G. Kendrick, being severally duly sworn, each for himself says: I am a citizen of the United States, and a freeholder in the State of Michigan. I am worth in property, not exempt from execution, the sum of one thousand dollars over all my just debts and liabilities.

MORRIS RICHTER.
PAUL ULLRICH.
F. G. KENDRICK.

Subscribed and sworn to before me, this 22nd day of December, A. D. 1883.

G. M. CROCKER, [SEAL].
Notary Public, Macomb Co., Mich.

The foregoing bond is approved as to form and sufficiency as a supersedeas.
Dated December 26th, 1883.

S. L. WITHEY,
Dist. Judge.

Filed December 31st, 1883. GAD SMITH,
Dep. Clerk.

135 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Equity.

MORRIS RICHTER, Complainant,
vs.
THE UNION TRUST COMPANY OF NEW YORK, GEORGE JEROME, Survivor of George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Lake Superior Ship Canal Railroad and Iron Company; Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, Frederick F. Ayer; and Frederick Ayer, Benjamin Dean, and Jacob Rogers, Trustees under the Will of James C. Ayer, Deceased.

To the Honorable, the Supreme Court of the United States:

The appeal of the above-named Morris Richter, complainant and appellant, respectfully shows:
That upon the seventeenth day of July, A. D. 1882, the appellant filed his bill in the circuit court of the United States for the northern division of the western district of Michigan against the above-named defendants and Fernando C. Beaman, joint assignee in bank-

ruptcy with the said George Jerome of the Lake Superior Ship Canal Railroad and Iron Company, a bankrupt; that subpœnas were duly served upon said assignees in bankruptcy, and upon the said. The Union Trust Company of New York; that prior to the appearance of either of said assignees to the said bill of complaint the said Fernando C. Beaman, deceased, — leaving the said George Jerome, sole surviving assignee.

136 That such proceedings were had that the said complainant's said bill was taken as confessed by the said The Union Trust Company of New York, and thereafter the other defendants above-named appeared in said cause, by Messrs. Meddaugh, Driggs & Harmon, and interposed a joint demurrer to said complainant's said bill of complaint, for want of equity; and that thereupon the said complainant, by leave of the court, amended his said bill of complaint, and the said defendants last named subsequently interposed the same demurrer to said bill of complaint as amended.

That said cause came on for hearing upon said demurrer before the said court on the 18th day of May, A. D. 1883, and afterwards, to wit, the 30th day of November, A. D. 1883, a final decree was made and pronounced by said circuit court sustaining said demurrer, and unconditionally dismissing said complainant's said bill of complaint with costs; and this appellant refers for greater certainty to the records of said suit, wherein the said decree was enrolled and filed in the clerk's office of said court at Marquette, the day and year aforesaid.

And this appellant further shows that the matter in dispute in said suit, and concluded by said decree, exclusive of costs, largely exceeds thirty thousand dollars.

Wherefore this appellant appeals from the said decree dismissing complainant's said bill as amended, and respectfully prays that the same and the said amended bill, and the documents referred to therein, which were read and considered on the hearing of said cause, and the said demurrer and proceedings in said cause, may be sent to the Supreme Court of the United States without delay; and that the said Supreme Court will proceed to hear the said cause anew; and that the said decree of the said circuit court may be reversed, and a decree made granting the relief prayed in said amended

137 bill of complaint, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated December 26, 1883.

J. P. WHITTEMORE,
Solicitor for Complainant and Appellant.

This appeal is allowed as prayed, citation to issue, bond having been approved.

Dated December 26, 1883.

S. L. WITHEY,
Dist. Judge.

Filed December 31, 1883.

GAD SMITH,
Deputy Clerk.

138 By the Honorable Solomon S. Withey, one of the judges of the circuit court of the United States for the northern division of the western district of Michigan to George Jerome, survivor of George Jerome and Fernando C. Beaman, assignees in bankruptcy of The Lake Superior Ship Canal Railroad & Iron Company; Josephine Ayer, Leslie Josephine Ayer, Henry Ayer, & Frederick F. Ayer; and Frederick F. Ayer, Benjamin Dean, and Jacob Rogers, trustees under the will of James C. Ayer, deceased:

Whereas Morris Richter has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern division of the western district of Michigan in your favor, and has filed the security required by law, you and each of you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October, A. D. 1884, to do and receive what may appertain to justice in the premises.

Given under my hand, at the city of Grand Rapids, in the western district of Michigan, in the sixth circuit, the 26th day of December, A. D. 1883.

S. L. WITHEY,
Dist. Judge.

139 We hereby accept service of the within.
Dec. 28th, 1883.

MEDDAUGH, DRIGGS & HARMAN,
Solicitors for Defendants.

[Endorsed:] 36. U. S. circ't court, N. D. of W. dist. of Michigan. Morris Richter *v.* Union Trust Co. & *al.* Citation on appeal. Filed Dec. 31, '83. Gad Smith, dep. clerk. J. P. Whittemore, pl'ff's sol'r.

140 The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Gad Smith, deputy clerk of the said court, do hereby certify that the within and foregoing are true copies of the files and records in the cause therein entitled; that I have carefully compared the same with the original thereof now remaining on file and of record in my office, and that they are a correct transcript therefrom and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and the seal of said court, at the city of Marquette, this 22d day of January, A. D. one thousand eight hundred and eighty-four.

[Seal of U. S. circuit court, northern division, western district of Michigan.]

GAD SMITH,
Deputy Clerk.

Endorsed on cover: W. Michigan C. C. U. S. No. 513. Morris Richter, appellant, *vs.* George Jerome, survivor of George Jerome and Fernando C. Beaman, assignees in bankruptcy of The Lake Superior Ship Canal Railroad and Iron Company *et al.* Filed 23rd April, 1884.

10—513

THE SUPREME COURT OF THE UNITED STATES:—IN EQUITY.

MORRIS RICHTER,
Complainant,
vs.
THE UNION TRUST COMPANY, of New York, GEORGE JEROME, Survivor of GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy, of the Lake Superior Ship Canal Railroad & Iron Company, JOSEPHINE AYER, LESLIE JOSEPHINE E. AYER, HENRY AYER, FREDERICK F. AYER and FREDERICK F. AYER, BENJAMIN DEAN and JACOB ROGERS, Trustees under the Will of JAMES C. AYER, Deceased.

STATE OF MICHIGAN.
EASTERN DISTRICT OF MICHIGAN, } ss.
County of Wayne.

Morris Richter, being duly sworn, doth depose and say, that this deponent is the complainant in the above entitled cause; that the bill of complaint in said cause was filed with the clerk of the Circuit Court of the United States, for the Northern Division of the Western District of Michigan, in equity, at Marquette, in the State of Michigan, on the 17th day of July, 1882, by this deponent, as complainant, against the above named defendants as defendants; that said bill

has been taken regularly as confessed against the defendant, the Union Trust Company of New York, and that the other defendants, although they have appeared to, yet they have not answered said bill, but have put in a demurrer thereto. That the demurrer in said cause has been heard before the Hon. S. L. Withey, District Judge acting as the Circuit Judge for the said court, and upon said hearing, after consideration, the bill of complaint was ordered to be dismissed; said demurrer being sustained by the said Circuit Judge. That an appeal in said cause has been duly taken by this deponent and the cause is now on the docket of this court awaiting hearing in due course, and will be as deponent believes, number 882 on said docket for the next term of this court. That, as deponent believes, the cause cannot be reached for hearing until the lapse of at least two or three years from the present date. That the witnesses of deponent by whom he expects to make the case stated in his bill, a copy of which is now on file in the return of the clerk of said Marquette Circuit, to this court; are aged and infirm, and reside at a great distance most of them more than 500 miles from the place of trial of said cause, and several of them are single witnesses to material facts in the cause, which facts can severally, only be proved by the several witnesses as hereinafter stated, according to deponent's knowledge and belief.

That Francis W. Anthony is one of said witnesses and is upwards of 65 years of age, as deponent is informed and believes, and resides in the Northern Peninsula of Michigan, and is a witness by whom deponent expects to prove that he, the said Francis W. Anthony, in connection with the directors of the corporation,

then known as the Portage Lake and Lake Superior Ship Canal Company, assisted and abetted the plan alleged in complainant's said bill, of organising the corporation known as the Lake Superior Ship Canal Railroad and Iron Company, and in putting upon the market $1,300,000 of its coupon bonds, purporting to be secured by mortgage of the fee of 200,000 acres of land in the Upper Penisula of Michigan, known as the Wagon Road lands (as more particularly stated in said bill of complaint), when, in fact, the said Lake Superior Ship Canal Railroad and Iron Company had a legal title only to 47,000 acres of said land, and an equitable title by contract of purchase from the State of Michigan to 153,000 acres thereof. That the said Francis W. Anthony received the money, the products of the sale of said bonds so put upon the market and sold to bona fide purchasers, and subsequently colluded with James C. Ayer, predecessor of defendants (who claim under him as volunteers in this case) to procure the legal title to 150,000 acres of the said lands (thus purporting to have been mortgaged, as security for said bonds), from the State of Michigan, which then held said title; and that the said James C. Ayer had full knowledge of the facts that the said Anthony had procured the said bonds to be put upon the market, and had obtained the money thereon of bona fide purchasers of said bonds upon the representation of a legal title of the said 153,000 acres of land in the said Lake Superior Ship Canal Railroad and Iron Company. That the said Anthony is the only witness to the aforesaid facts and knows all of the actings and doings of said Anthony in the premises. That, as deponent believes, there is danger that the said An-

thony, by reason of his advanced age, may decease before this cause can be reached in its regular order and heard, in case of its being sent back for trial upon the merits, before the same can be gotten ready for trial and brought to a hearing in due course of practice.

That William L. Avery, who resides at Mt. Clemens, in the State of Michigan, is also a material witness for this deponent in the said cause. That the said William L. Avery is upwards of 70 years of age, and this deponent is advised by his counsel, after stating the facts which deponent expects to prove by him, that the said Avery is a material witness for deponent in said cause; without his testimony deponent cannot safely go to hearing in said cause. That said Avery is a single witness and the only witness to material facts alleged in said cause, to wit: to the facts alleged in said bill of complaint with regard to the proceedings of the directors of the Portage Lake and Lake Superior Ship Canal Company in manipulating and executing the scheme alleged in said bill for putting the bonds of the last named company upon the market and in procuring money from the bondholders thereon, on the representation that said bonds were secured by a mortgage of the legal title of 200,000 acres of the Wagon Road lands, hereinbefore mentioned, when in fact the said company had only an equitable title thereto as hereinbefore stated. That the said William L. Avery was one of said directors and the only one who, to deponent's knowledge, has full cognizance of all the facts relating to said transaction and the negotiations of said Portage Lake and Lake Superior Ship Canal Company with the said Anthony and the facts and proceedings which resulted

in putting upon the marker the bonds aforesaid purporting to be secured by legal title, when, in fact, they were only secured by an equitable title to said lands.

That said Avery is also a material witness to prove the negotiations of said directors, the said Portage Lake & Lake Superior Ship Canal Company, with the late James C. Ayer and other capitalists to whom the said Ayer recommended the said directors for further capital to bring the canal and railroad enterprises to a successful conclusion after said bonds had been placed on the market as hereinbefore stated. That as deponent is informed and believes the said Avery knows the facts that the said James C. Ayer had full notice from the said directors of the condition of the said securities, as stated in complainant's bill when he entered the syndicate as a member thereof with said Davis, as mentioned and set forth in said bill, and laid the plan to obtain the legal title from the State of Michigan under the said Anthony's contract with said State, with full notice of said Anthony's relations to said directors and to the said Wagon Road contract.

Deponent avers that there is danger that the evidence of said Avery may be lost before this case can be brought to a hearing in accordance with the regular practice of this Court unless his testimony is taken *de bene esse.*

Deponent further says that Samuel L. Smith, who resides in Lansing, in the State of Michigan, is also a material witness for this deponent in said cause, as this deponent is advised by his said counsel, after stating the facts which deponent expects to prove by said Smith in said cause, which this deponent verily believes

to be true, and that said Smith is a single and only witness to material facts in said cause, without proof of which, as deponent is informed by his counsel and verily believes, he cannot safely go to trial.

Deponent expects to prove by said Smith the facts relating to the negotiations, and the arrangements alleged in said bill between James C. Ayer, deceased, and Schuyler F. Seager, through which said Ayer (through the agency of said Seager) procured the title to 153,000 acres of land from the State of Michigan as in said bill alleged. That deponent is informed and believes that said Smith was interested with said Seager in assisting said Ayer to procure said title from the State of Michigan under said Anthony's contract, and with means furnished by said Ayer, did procure said legal title under said contract from the State of Michigan, with full notice of the equitable lien of the bonds, which are represented by the complainant's bill. That said Seager and James C. Ayer are both deceased and said Smith is the only witness to said transactions known to deponent.

Deponent further says that Alfred Russel, who resides in Detroit, Michigan, in also a material witness for deponent in said cause and is a single witness and the only witness to many material facts to complainant's case therein and which deponent expects to prove by said Russel. That deponent expects to prove by said Russel that he was employed and paid by the syndicate of which the said James C. Ayer, under whom the defendants claim, was a member, and that the said Russel managed said cause in the name of the Union Trust Company of New York the plaintiff therein, in the interest of said Ayer, and of said

syndicate, in violation of the duty of the said trustee to the bondholders, as more particularly alleged and stated in said bill of complaint on file in this cause, and thereby procured for said Ayer the adverse claim of title which is the subject of litigation by deponent's said bill.

That deponent has fully and fairly stated the facts which he expects to prove by each of said witnesses, to his counsel, Joseph P. Whittemore, who is solicitor for the complainant in this cause, and is advised by said counsel after full statement of the facts which he thus expects to prove by each of said witnesses, that the testimony of each of said witnesses is material, and that deponent cannot safely proceed to trial without their testimony respectively, as hereinbefore stated, which advice, given after such statement as aforesaid, deponent verily believes to be true and correct.

That deponent has applied to the Hon. S. L. Withey, under the provisions of equity rule 70, of the Circuit Court, for a commission to issue in this cause, to take the deposition of said witnesses upon the statement of the facts aforesaid, which application the said judge has denied, because of doubts expressed by said judge of his power to grant said commission, after said bill was dismissed and the case appealed.

Wherefore, deponent is advised and applies accordingly to this court for relief in the premises, and that a commission may issue in this cause to take the examination *de bene esse* of the said witnesses respectively. That any proceeding by bill in equity to perpetuate the testimony of said witnesses seems impracticable, for the reason that the defendants in

said cause reside in different States, and all reside out of the District in which the property which is stated in the bill of complaint in this cause is situated, to-wit: some of the defendants reside in the State of Mass., others in the State of New York, and others in the Eestern District of Michigan, and none of them in the District in which the land lies, upon which the mortgage which is sought to be foreclosed in this cause as an equitable mortgage, is claimed to be an equitable lien, and no single bill which could be filed would authorize any court in either District where the defendants respectively reside, to grant the relief of perpetuating thn testimony aforesaid. Wherefore, this deponent is advised to apply to this court for that relief, which the power to make rule 70 for the guidance of the Circuit Courts in such cases, necessarily implies the power to grant.

Deponent further says that Charles Flowers, who resides in the City of Detroit, is a reputable attorney, practicing law in said City, and is in no wise interested for any of the parties in this cause, nor of counsel for nor of kin to any of them; that he has formerly officiated as stenographer in the Circuit and District courts of the United States, for the Eastern District of Michigan, and has acted as Commissioner of the District Court for the county of Wayne for several years, and is in every way qualified to act as the commissioner in this case, to take the examinations in this cause: wherefore, deponent prays that by the direction of this court, the Clerk of the Circuit Court aforesaid, may be authorized and directed to issue a commission to the said Charles Flowers, to take the testimony of the aforesaid witnesses respectively, upon notice (to be

prescribed by the order of this court) to be given to Messrs. Meddaugh, Driggs & Harmon, who reside in Detroit, and who are the solicitors who have interposed said demurrer, and appear for all the defendants other than the Union Trust Company aforesaid in said cause MORRIS RICHTER.

Subscribed and sworn to before me this 8th day of April, A. D. 1885. JNO. GRAVES,
U. S. Circ't Ct. Com'r,
Eastern Dist. of Michigan.

THE SUPREME COURT OF THE UNITED STATES:—IN EQUITY.

MORRIS RICHTER,
Complainant,
vs.
THE UNION TRUST COMPANY, of New York, GEORGE JEROME, Survivor of GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy, of the Lake Superior Ship Canal Railroad & Iron Company, JOSEPHINE AYER, LESLIE JOSEPHINE E. AYER, HENRY AYER, FREDERICK F. AYER and FREDERICK F. AYER, BENJAMIN DEAN and JACOB ROGERS, Trustees under the Will of JAMES C. AYER, Deceased,
Defendants.

To Messrs. Meddaugh, Driggs & Harmon,

Solicitors of and of counsel for the defendants in the above cause:

Take notice, that on the foregoing affidavit and upon the return of the clerk of the Circuit Court of the

United States for the Northern Division of the Eastern District of Michigan in equity, to the Supreme Court, now on file in this court, a motion will be made for an order as prayed in the affidavit or petition of Morris Richter herewith served upon you, authorizing the clerk of the Circuit Court of the Northern Division of the Western District or Michigan, in equity, to issue a commission to take the testimony of the witnesses named in said affidavit *de bene esse*, before Charles Flowers, Esq., of Detroit, commissioner. The said motion will be made to the said Supreme Court at Washington, on Monday, the 20th day of April, at the opening of Court on that day or as soon thereafter as counsel can be heard.

J. P. WHITTEMORE,
Solicitor for Complainant.

Dated Detroit, April 7, 1885.

United States of America.

SUPREME COURT.

October Term, 1886.

MORRIS RICHTER,
Appellant,

vs.

GEORGE JEROME, SURVIVOR OF GEORGE JEROME AND FERNANDO C. BEAMAN, ASSIGNEES IN BANKRUPTCY OF THE LAKE SUPERIOR SHIP CANAL RAILROAD & IRON COMPANY, *et al.*,
Respondents.

No. 245.

Statement of the Case and Brief.

J. P. WHITTEMORE,
Solicitor for Appellant.

DON M. DICKINSON,
JOHN S. SEYMOUR,
Of Counsel.

DETROIT
Potter Printing Co., 47 Buhl Block
1887.

Supreme Court of the United States.

October Term, 1886.

MORRIS RICHTER, *Appellant,* *vs.* GEORGE JEROME, SURVIVOR OF GEORGE JEROME AND FERNANDO C. BEAMAN, ASSIGNEES IN BANKRUPTCY OF THE LAKE SUPERIOR SHIP CANAL RAILROAD & IRON COMPANY, *et al.*, *Respondents.*	No. 513.

STATEMENT OF THE CASE MADE BY THE BILL.

The object of the plaintiffs' bill in this case is, to *establish* and foreclose, against the estate of the late James C. Ayer, now deceased, an equitable mortgage of land in the Upper Peninsula of Michigan; of which the decedent, in his lifetime, obtained the legal title, with full knowledge of the equitable lien of the plaintiffs.

The defence rely upon a supposed estoppel to the present bill, by force of a former foreclosure, the re-

cord and proceedings in which are set forth in the present bill, so that the question is fairly presented by their general demurrer for want of equity.

That point of estoppel will be found to be the principal point for argument on the demurrer to plaintiffs' bill on this appeal.

The land upon which the plaintiffs' bill claims an equitable mortgage, is 153,000 ; parcel of 200,000 acres known as the "Wagon road" lands ; granted to the State of Michigan by act of Congress, for the purpose of constructing a wagon road across the Upper Peninsula

The Lake Superior Ship Canal Railroad & Iron Company, a Michigan corporation, assuming title through a deed of warranty, more particularly hereinafter set forth, on May 1, 1871, made a trust deed of the entire "wagon road" grant of 200,000 acres, and 400,000 acres of other lands, more particularly hereinafter set forth, to the Union Trust Co. of New York, to secure 3500 bonds of the Ship Canal Co., of the same date, of $1,000 each, having thirty years to run, with interest at 7 3-10 per cent., semi-annually as pr. coupons attached.

The plaintiff is the *bona fide* holder of 230 of those bonds, and brings this suit in his own behalf and for all bond holders, for reasons which will appear in the sequel.

At the date of the trust deed aforesaid, the Ship Canal Co. held the legal title to only 47,000 acres of the wagon road land grant, which purported to be conveyed by that deed ; the legal title to the 153,000 acres thereof, in question, being then, in the State of Michigan, subject to the equities of a partly per-

formed land contract with Francis W. Anthony, for the construction of the "wagon road;" for which he was to be paid, in the land, as the work progressed.

The Ship Canal Co., when it gave that deed, had obtained, through Anthony, a deed in fee, of the 47,000 acres; and had an equitable right, (which will appear in the sequel,) of *subrogation to Anthony's rights*, under his partly performed land contract, wherewith to obtain from the State of Michigan, the residue of the land grant.

We proceed with a short statement of the equity of our bill for the bond holders, who purchased the aforesaid bonds in good faith, relying upon certificate of the Union Trust Co. upon each bond, that the bonds were secured by a first lien on the fee of the entire 200,000 acres of the "wagon road" grant; the bonds having been put upon the market by Anthony and the directors of the Ship Canal Co., who had combined in a scheme to procure that certificate of the Union Trust Co., and sell the bonds to the public, in the aforesaid imperfect condition of the title of the Trust Co., expecting, probably, to perfect that title by completion of Anthony's contract, with money to be obtained on the bonds.

Our statement will also show, as we proceed, the facts upon which the defendants base their claim of estoppel, by reason of a former foreclosure suit, brought by the Union Trust Co., by bill which set forth the mortgage purporting to cover the whole 600,000 acres, but proceeding under it against only 47,000 acres, of the wagon road grant.

Our narration will also show *collusion of the Union Trust Co.* with Ayer, in that former fore-

closure ; in an attempt, *by the decree therein*, without any foundation for it in the bill, to cut off the bondholders equity, alleged in this bill againgt Ayer, as to the remaining 153,000 acres of the wagon road grant ; which attempt the present bill discloses, and relies upon, as good cause why the bondholders bring this suit, instead of suing in the name of that trustee, against whom this bill has, regularly been taken as confessed.

We proceed with our narration:

At the date of the deed of trust, aforesaid, to the Union Trust Co., Anthony had earned something over 150,000 acres of the "wagon road" grant, and had received patents for 47,000 acres of it, and had become financially embarrassed, and went to New York city to raise money on the credit of his enterprise.

He there met the directors of the Ship Canal Co., which was also donee of 400,000 of other land in the Upper Peninsula of Michigan, in two land grants of 200,000 acres each, granted by congress for the purpose of constructing a ship canal across what is called "The Portage."

Anthony found these directors also embarrassed for want of funds to complete their unfinished work ; they having mortgaged all their 400,000 acres of land, by three mortgages, securing coupon bonds for about two millions of dollars, which had been hypothecated at 50 per cent. of their face value, for loans of about one million of dollars, to different parties, among whom, for large amounts, were James C. Ayer, and the Ocean National Bank of New York.

Anthony having failed in all other endeavors, at last, in the winter of 1870-1871, met the directors of

the Ship Canal Co., and they conbined in the scheme for putting forth to the public, a trust deed to the Union Trust Co., purporting to cover 600,000 acres, embracing the said 200,000 "wagon road" grant, together with the 400,000 acres, and the canal of the Ship Canal Co., subject to the mortgages aforesaid, as security for $3,500,000 new bonds of the Ship Canal Co., certified by the Union Trust Co, as secured by the entire 600,000 acres.

The scheme aforesaid, was briefly, as follows, viz: Anthony and the directors were to co-operate and to procure legislation in Michigan, authorizing the Ship Canal Co. to accept subscriptions to its stock, payable in land; Anthony was to deed his 47,000 acres, and assign his interest in his land contract to the directors, as individuals at an agreed price of 75 cts. per acre for the land: the directors, as individuals, were to make their *warranty deed* to the Ship Canal Co., of the entire land grant of 200,000 acres, in payment of subscription by the directors for two millions of its stock; the Ship Canal Co. was to make the trust deed aforesaid, to the Union Trust Co.; who it was supposed would certify the bonds, as being secured by the fee of the entire 600,000 acres, and canal, thus apparently owned by the Ship Canal Co., upon which bonds, the money was to be raised, and appropriated to retiring the loans upon which the prior mortgage bonds of the Ship Canal Co. had been pledged: and to the completion of the Ship Canal, and Anthony's contract; whereby, (*i. e.*, by finishing Anthony's contract,) the directors would get the legal title to the 153,000 acres of lands, which their deed to the Ship Canal Co. had anticipated; which title, through the warranty of the

directors in the last named deed, would enure to the Ship Canal Co., and thus perfect the defective title of the Union Trust Company, through covenants for further assurance, contained in its deed from the Ship Canal Co.

The foregoing plan was executed according to that programme, to the point of issuing bonds to the Union Trust Co; and thirteen hundred of those bonds were put upon the market by Anthony and the directors, under the certificate of that trustee; that the bonds were secured by the fee of the 600,000 acres of land grants, and canal; and those bonds were purchased, or received in hypothecation for loans, in good faith by the public; and Anthony received $52,000 of the money raised thereon.

Through the negotiations of Anthony and the directors, their scheme was approaching an assured success, on the basis of a completed title to the entire 600,000 acres, when that success was thwarted, and the credit of the Canal Co. wrecked, by the machinations of a wrecking syndicate, inaugurated by Theodore M. Davis, who had procured himself to be appointed receiver of the Ocean National Bank of New York, which had been declared bankrupt; and in which syndicate Davis had enlisted James C. Ayer, and other large holders of the hypothecated bonds of the first three issues of the Ship Canal Co., the said Davis, as receiver holding besides large amounts of the old bonds, some 270 or more, of the said 1300 of the Union Trust bonds in hypothecation; while he, and his syndicate knew all about the scheme of Anthony and the directors, and consequent condition of the securities, as it is hereinbefore stated.

The scheme of the syndicate was to break down the credit of the Ship Canal Co., and thwart the contemplated loan; and to acquire all the land grants and canal, and, for this purpose, they combined.

First. To foreclose their pledges of bonds, and get the legal title to them, by selling the bonds to each other, in the open market, and bidding them in, at the lowest prices, in the interest of the syndicate; and then to foreclose for the face value, on all they held, and on all they could buy from outsiders.

Second. At the same time to cut the 153,000 acres of the "wagon road" grant out from under the lien of the Union Trust Co's. deed of trust; by collusion with Anthony to finish the performance of his land contract under the auspices of the wreckers, and thereby procure the title from the state of Michigan, to themselves.

The syndicate proceeded to execute this wrecking scheme; and, first, proceeded, as aforesaid, to *foreclose the pledges of their bonds;* and then commenced foreclosure, through their solicitor in Detroit, on their first three mortgages upon the Ship Canal Co's 400,000 acres; and subsequently proceeded to buy up Anthony, from his allegiance to his scheme with the directors of the Ship Canal Co., and procured him to complete the work of his "wagon road" contract with the state of Michigan, under the auspices, and with the money of James C. Ayer; the syndicate having agreed, in consideration of Ayer's furnishing the money to buy over Anthony, and to complete the work under the contract, that Ayer should have the exclusive benefit of the legal title to the 153,000 acres, to be thereby obtained from the state of Michigan.

The foregoing subsequent scheme of the syndicate was executed; and Ayer bought over Anthony, and finished the "wagon road" contract under him; and got title to the 153,000 acres under the contract; and then, Ayer, and the syndicate, set about cutting off the equity of the bond holders under the Union Trust deed, by the semblance of an estoppel, which *they now insist upon* under this demurrer.

They accordingly colluded with the Union Trust Company, to allow their said Detroit solicitor to foreclose that trust deed of the 600,000 acres, inclusive of the 200,000 acres of wagon road land grant aforesaid, in the interest of, and on the retainer of the syndicate; and to conduct the proceedings in that foreclosure, so that Ayer's legal title to the 153,000 acres should, not only not be questioned in that suit; but so far as practicable, without questioning Ayer's legal title, to fortify that title through *the decree to be obtained* on the foreclosure of the trust deed of 600,000

That collusive arrangement was made with the Union Trust Company, as follows:

The consent of the Union Trust Company to the foreclosure in its name, by the syndicate's solicitor, in privity with the aforesaid designs of the syndicate was obtained, the bill of foreclosure was, accordingly, filed, without making Ayer a party defendant thereto, and without disclosing any equity against Ayer, or his lands, or any equity, or claim against anybody, as to the 153,000 acres; but, on the contrary, the bill seems to excuse the not making any claim to that land, by intimations, carefully worded, that the legal title to that residue of the 200,000 acres which the trust deed purported to convey, had been *deeded to*

other parties by the state of Michigan: and *was therefore lost to the Ship Canal Co.*, the mortgagor; yet, in the prayer of that bill, it was prayed that the 47,000 acres of the wagon road grant, *together with any right or equity of the mortgagor in the residue of the wagon road land grant* of 200,000 acres, *be sold on that foreclosure;* and then followed the usual prayer that *possession be delivered* to purchasers on production of the master's deed. (See bill, Record, p. 63.)

That suit, under that bill proceeded to decree, which that solicitor procured *by consent of the assignees in bankruptcy*, of the Ship Canal Co.: (which, in the meantime, had been declared bankrupt;) and that decree, which, with the said former foreclosure bill, are given in full in this record, is made to declare, and adjudge in respect to the lands in question, as follows, (p. 29 of record,) viz: "That the said "Union Trust Co. mortgage *did actually* cover 47,958 "85-100 acres of the said 'wagon road lands,' to-wit: "the lands particularly described in 'Exhibit C,' "(the 47,000 acres) attached to the bill, filed by the "said Union Trust Co., of New York; and "that the said 1300 bonds, issued by the said "Union Trust Co., are a first lien on the said 47,- "958 85-100 acres of land. That the title to the re- "mainder of said wagon road land, *passed from the "State of Michigan to third parties*; so that, as to "the same, the said Union Trust mortgage, *covers "only a possible equity*; which *equity* in the said "residue of 200,000 acres of wagon road lands *is also "a security for said 1300 bonds.*" (*Record, pp. 30, 31.*)

It then proceeds to adjudge that the 47,000 acres be sold, *and that all the right, equity, and equity of redemption of the mortgagor*, in such residue (the 153,000 acres) *be sold with said 47,000 acres as one parcel.* (See Record, p. 32.)

The form of a sale was proceeded with accordingly, under the decree.

The foreclosing syndicate bid in the 47,000 acres, *and "the equity"* as one parcel; and, retaining the 47,000 acres, released the equity to James C. Ayer, in aid of his legal title; so now, that decree, and sale of that "possible equity," which was not set forth in the bill; and which, for aught that appears, or that *could appear* in evidence under that bill, *remained unknown* to the court making the decree; to the mortgagor defendant; to the bondholders, in whose behalf the decree was made; to the master who made the sale; to the purchaser at the sale; and to the court, to whom the master reported the sale; constitutes the claim of estoppel, now relied on by Ayer's representatives, to sustain their demurrer, for want of equity, to the plaintiff's bill, here; but the plaintiff insists, that the whole proceeding was but a vain, corrupt, delusive, and impotent attempt to shield Ayer from the equity of the bondholders; while the fact of, and collusion of the trustee in, the attempt, is insisted as a good reason why the plaintiff should not seek this, or any relief in the premises, in the name of that trustee.

We call attention, in passing, to the fact that it was the "*mortgagor's* equity" that *purported* to be decreed to be sold; and not the bondholders' nor trustees' equity against Ayer, or the land; and we

suggest here, that if the trustee has procured the bondholders' equity to be sold, it has sold its equitable mortgage, instead of foreclosing it; and that if the bondholders' equity was not that which was sold, it remains unaffected by that decree; but it was insisted in the court below, that the bondholders' and mortgagors' equity were one; and that that *unit* was what was sold, and subsequently released to Ayer; and we understand it to have been so held by that court; but no opinion having been given, or filed, we cannot be more explicit as to what was held in that regard in that court.

We had supposed, till that judgment of that court, that the mortgagors' equitable right *in Ayer's land*, at the time of that decree, was precisely that which a court of equity would have decreed on a bill, stating the facts, and making Ayer and the Union Trust Co., parties defendant: that the mortgagor had an equity to that only, which it had not transferred to the trustee as security for the bonds; and that the trustee had an equity precisely commensurate with what the mortgagor had equitably transferred to it for the purposes of such security, with surplus to the mortgagor, viz: that the mortgagors' equity could affect only that surplus.

Not being advised of the fallacy of our notion by any opinion of the court below, we must needs present the point for the consideration, and judgment of this court, on the question of the identity of the mortgagors' and mortgagees' equity in Ayer's land.

Aside from the question whether the facts stated in the bill present an equity; and the question of estoppel; there remains, of the points urged in the

court below, only the point of laches; and the facts which we deem material for the consideration of this point are:

1st. That the principal of the 1300 bonds is not yet due; and a new cause of action has accrued for default in payment of interest, at the expiration of every six months since the date of the bonds.

2d. The relations of Ayer and his successors, to the property have not been changed; the property remains, wild lands, unimproved; the title unchanged, except by succession; and there seems no probability of loss of evidence, in the circumstances of the case as stated; while, it is manifest, that Ayer took his title, through Anthony, with full knowledge of the equity of the plaintiffs' thirty years bonds, and coupons, as a semi-annual charge against the title he acquired.

POINTS FOR THE PLAINTIFF.

I.

THE BILL, ON THE FACTS, AS STATED, SHOWS TWO DISTINCT EQUITIES FOR THE BONDHOLDERS.

We deem it unnecessary to restate the facts from which these equities spring; but, in lieu thereof to state the conclusions we deduce from them, in accordance with equity law, which, on similar facts, has become elementary, and not necessary to be cited to this court.

1st. The facts show a case binding the conscience of the members of the Ship Canal loaning scheme, to-wit: Anthony, The Directors, and the Ship Canal Co., and Ayer, the assignee of one of them, (with notice,) to contribute all their respective rights under Anthony's land contract, to make good the representation of title, upon faith in which the bondholders' money was obtained through the execution of that scheme.

That scheme was a manifest fraud upon the bondholders; and notwithstanding any intent the original parties to it may have entertained, to purge that fraud, by perfecting title in the Union Trust Co. through completion of Anthony's contract with the state of Michigan; Ayer, in purchasing Anthony's rights under that contract, with knowledge of the facts, and of Anthony's obligations to the bond-

holders in respect of it, stepped into Anthony's shoes as to his rights, and thereby assumed his frauds, with, it seems, no such intention of purging them; and, although, it seems clear to us, that Anthony's obligation as a member of the joint scheme, bound him to make good to the bondholders, at his own expense, the representation of title he had cooperated in making to them; our bill demands only the *profits* which Ayer made by stepping into Anthony's shoes, in the premises.

2nd. The mortgagor seems also to have had an equity to be subrogated to the equity of the Directors to get a deed from the state of Michigan, by specific performance of Anthony's contract.

Whether, on the facts of the case, the equity of the Directors, against Anthony, had been equitably forfeited, for non fulfillment of their contract with him, when he sold out to Ayer, may be problematical; depending, perhaps, upon the effect of the agreement, and conduct of Anthony, in relying with the Directors upon the success of their joint loaning scheme, for the payments due to him from the Directors, on their purchase of his contract interest in the land; and upon whether Anthony could, equitably, have rescinded, and disabled himself to perform with the directors, by resale of his contract to Ayer, without timely notice, and without tendering to the Directors the $52,000 he had received under the loaning scheme; and upon other circumstances stated in the bill.

But, whatever may have been the equity of the Directors at that time, the Ship Canal Co. was entitled to be subrogated to it; and, at the time of the former foreclosure suit, and decree, the Union Trust Co. was

entitled to be subrogated to their grantor's (the Ship Canal Co.'s) equity to be subrogated to the equity of the Directors under Anthony's contract; and, on bill filed by the Union Trust Co., setting forth the circumstances, and making Ayer defendant, equity would, doubtless, have decreed such right of subrogation; and, upon the circumstances, would, doubtless, have perfected the mortgage of the Union Trust Co. as a first lien on the 153,000 acres; and would have decreed the surplus to the Ship Canal Co., after payment to Ayer, of what it had cost him to perfect his title to the land, under Anthony's contract. That is to say, either of them could have filed a bill against Ayer; the Union Trust Co., to perfect its mortgage; and the Ship Canal Co., to get the legal title, subject to the mortgage; on paying Ayer what it had cost him to perfect the title in himself.

But, whether equity would have so decreed or not, that right of subrogation of the mortgagor to the equity of the Directors, under their contract with Anthony, is the only equity the *mortgagor* had in the premises, when the former foreclosure bill was filed and decree entered in that case; and, so far as the plaintiff, in the case at bar, claims *under* the equity of the Ship Canal Co., (the mortgagor) he claims the right of subrogation, which equity would have decreed to the Union Trust Co, if it had made Ayer a party, and sought to perfect the lien of its mortgage on Ayer's land, and foreclose it in the former foreclosure suit.

In the case at bar, however, the plaintiff is not restricted to claim *under*, and in subordination to any equity of the Ship Canal Co.; nor was the mortgagee

in the former foreclosure suit so restricted; for the equity, herein first stated, is an independent, and paramount equity against Ayer, as the possessor of a title which, having been *equitably* pledged to the bondholders, by the joint action of Anthony, the Directors, and the Ship Canal Co., has come to Ayer through his own, and Anthony's fraudulent action, in diverting it from the object to which it had been previously pledged.

To sustain that paramount equity, no tender of indemity to Ayer was necessary; but, to sustain the 2nd equity, claiming *under* the Ship Canal Co., such tender was necessary.

Our bill relies on both equities and makes the tender necessary to sustain it in either aspect.

It would seem to be doubtful whether, upon the facts of the loaning scheme, any court would, upon motion of the Ship Canal Co., (a *particeps criminis* in that scheme,) have enforced its equity, however plain, against its own Directors, and Anthony, (associates in the scheme) or against the assigns of either of them; but, it would seem, that no Court would object to entertain a bill to enforce that equity in behalf of the bondholders, *in redress of the fraud* perpetrated through the loaning scheme: whether it had been brought by the trustee, or by the bondholders themselves, as it is here.

So also, it would seem that the equity of the Ship Canal Co. would have been available to its assignee in bankruptcy, the Defendant here, who appears, demurring to our bill; who, as representative owner of the entire 600,000 acres of mortgaged property, and of all the creditors of the Ship Canal Co.; not only of the

bondholders under the deed to the Union Trust Co., but of those under the other mortgages, was interested to have the whole 600,000 acres made available for sale under the *omnibus* decree, to which this assignee was induced to consent, in ignorance of the equity against Ayer; and, by the representation in the former foreclosure bill, that "title to 153,000 acres of it had been lost to the mortgagor."

II.

THE FORMER FORECLOSURE, DECREE, AND SALE, CREATED NO ESTOPPEL TO THE PRESENT SUIT.

(a) THE EQUITY OF THE PRESENT SUIT WAS NOT BEFORE THE COURT IN THAT SUIT.

1st. *It was not set forth in the former bill.*

The case of *Koehler vs. Blk River Iron Co.*, 2 Black, 715, is decisive of this proposition.

2nd. *It was not included in any statement of the former bill.*

It was argued, in the Court below, that the trust *deed* was a conveyance of the mortgagor's equity; and hence, the deed being stated, and the mortgagor, who gave it, being defendant, both subject matter, and party were before the Court; therefore the decree of sale of the subject matter was, *coram judice*, and a finality.

The case in *2nd Black ante*, disposes of the foregoing assumptions of the defense.

Those assumptions are based on a too common misapprehension of the nature of an equity; in supposing it to be an interest *in præsenti*, in the land, instead of a collateral abstract right to get such an interest, through a suit in chancery.

The deed, in fact, as to the land in question, was a nullity, not capable of effecting so much as notice of a title, either legal or equitable, to the land it purported to convey

If the deed conveyed any *estate in* the land, law was adequate to the protection, and conservation of all such interest in the estate; and notice of the deed would be notice of the conveyance of such right.

It was not the deed that created or conveyed either the mortgagor's or the mortgagee's equity in Ayer's land; but, the equity sprang, in each instance, from the consideration for the deed, and the circumstances inducing the payment thereof; the deed being one of those circumstances; the only effect of the deed (*ex vi proprii*) to the Union Trust Co., being, to appoint a trustee, whom equity would regard as the *legal* appointee of the parties, with "title to sue" *en autre droit*, as representative of the "title to relief" of the bondholders, which all the circumstances when stated, would have shown; but even this "title to sue" comes, not from the deed, but from equity; and is subordinate to the direction and control of that Court, upon circumstances; such, for instance, as those in the case at bar, where the Court permits the *cestui que trust* to represent both his "title to sue" and his "title to relief."

As we have said, the fallacy of the defense came of the assumption that an equitable title to land is a title, *in præsenti*, to the land itself.

They forget that law is adequate to the protection, and conservation of all rights *in* property; of all rights in the concrete; while equity's domain is in the realm of rights in the abstract; of those rights which ought to, but do not, *ex proprio vigore*, affect property—that equities exist outside of, and collatteral to property; resting in, and as liens upon the conscience of the holder of property; that equity's jurisdiction is of persons having conscience to regulate; not of material things which have none.

That the Chancellor is the embodied legal, practical, (as distinguished from the impractical moral) conscience of the Realm; with authority, to regulate, by his decrees, the consciences of the subjects of the Realm; and with civil power to compel their action in accordance with their conscience as thus regulated—that an "equitable title" to, or lien upon anything, consists of circumstances, which, embodied in a bill, presented to the Chancellor, constitute a "title to relief" in his Court—and that no equitable title is more or less than a "title to (get) relief" in his Court, on presentation of a bill stating such title; and that until the "title to relief," whether it be to get a lien, mortgage, or fee, is decreed, and the decree executed, it affects nothing but the conscience of the defendant, and those claiming under him, with consciences affected by notice; whether such notice be constructive, as by *lis pendens*; or actual; or of record, by statute.

Such being the nature and effect of an "equitable title," it is clear in the case at bar, that whatever equity there was, was a right of action *in personam* against Ayer; and that neither the "equitable title" of the mortgagor, nor that of the mortgagee to any

relief against Ayer, was brought before the court by the former foreclosure bill, either for the purpose of enforcing, or selling the equity.

That such is the nature of an equity, we proceed to demonstrate by authority, premising, as an apology for so doing, the wonderful prevalence of the fallacious notions of the defense in respect thereof. And we cite:

First. Mr. Fonblanque's definition of an equity, or trust, (which is the same thing) in his treatise on Equity, Sec. II, in these words: "Now, an use is a "trust or confidence, which is not issuing out of the "land, but as a thing collateral, annexed in privity "to the estate, and to the person, concerning the land; "so that the *cestui que trust* had neither the *jus in* "*re*, nor *ad rem*; neither a right in possession, nor in "action; but only a confidence and trust, which the "common law, though it took notice of, would not "protect, nor give him any remedy for it; but his "remedy was only by subpœna in chancery."

In *Penn vs. Baltimore*, 1 Ves., 444, *Lord Hardwicke*, held the conscience of the defendant, who had been served within the jurisdiction, bound by the articles of agreement; hence, sitting in Westminister, he decreed the settlement of the boundaries between Pennsylvania and Maryland—saying, "the strict pri-"mary decree of this Court is *in personam*."

See also Hare and Wallace's notes to this leading case of *Penn vs. Baltimore*, for cases innumerable, holding the same doctrine.

In *Massie vs. Watts*, 6 Cranch, 148, Pr. Marsnall Ch. J., holding the same doctrine, sustaining the court sitting in Pennsylvania, with the parties before it, in settling title to land in Ohio.

In *Van Ness vs. Hyatt*, 13 Peters, 300 301. The right of a purchaser under a land contract held to be only an interest resting in contract, and not the subject of sale on execution at law—because it was no title to the land.

In *Hart vs. Sansom*, 110 U. S. Rep., 154, Pr. Gray Justice, delivering the judgment of this Court, it is held that the court of equity has no jurisdiction *in rem* saying, p. 155, this Court "has *no inherent* "*power*, by the mere force of its decree, to annul a "deed, or to establish a title."

So in *Gay vs. Parpant*, 106 U. S., 679, Pr. Miller J., this Court holds that the decree of the Court of Equity, partitioning lands, did not operate *in rem;* but only *in personam* by compelling the execution of deeds between the parties. So that a mortgage given by one of the parties to such a decree, subsequent to the date of the decree, was held, under the circumstances, to bind the land mortgaged, notwithstanding the decree.

So in *Morsell vs. First Nt'l B'k*, 91 U. S., 357. This court holds the lien of a judgment not to attach against an equitable title to lands, because the equity is no interest in the land.

So in *The Freedman's Saving & Trust Co. vs. Earle*, 110 U. S., 710, Pr. Matthews J., the judgment in the last preceding case approved, and followed in principle, by decreeing that to be made a legal lien of an execution at law, which ought to have been, (but was not,) a lien upon an equity—or, in other words, holding it to have been an equitable lien, which is no lien at all, but only a right to have a lien, through the enforcement of decree in chancery ; as, we insist,

is the case of every other equitable estate in property; whether it be an equitable fee, mortgage or lien; which are merely rights to go into equity to make them corresponding legal estates, as conscience required, when the rights accrued; and, as nearly as practicable, as of the date of their accruing; the equitable lien of bill filed, being as good as a legal lien in operating as notice of *lis pendens*, and *caveat* to the world of its conclusions, whether in rewarding the diligent or otherwise.

And thus is solved the mystery of "equity following the law," and of the lien in chancery, of an execution at law, whether returned "nulla" or not, upon trust estates, or choses in action of defendants therein, upon which the execution at law, had, or could have no effect; as well as that of other problems, which seem to have mystified the profession throughout the states.

(b.) *Even though the equity of the mortgagor had been stated in the former bill, it would have given the court no jurisdiction in respect of it, without Ayer being made a party defendant to that bill.*

1st. It would have been an immaterial statement, being a right merely to charge Ayer's conscience with the equity, in respect of which the Court could not have decided, without giving Ayer his day in Court, as to whether the equity existed.

2nd. It would have given the court no right to decree in respect of Ayer's land, until the equity had been charged against the owner's conscience.

This second subdivision is fully sustained by the case of *Cunningham v. The Macon & Brunswick R.*

R. Co., et al., 109 U. S., 446, pr. *Miller* J., delivering the opinion of this Court. Mr. Justice *Harlan* dissenting; but not on the ground of the indispensability of the owner of the land being made a party defendant.

(c.) *Even though the equity of the mortgagee against Ayer had been stated in the former bill, it would have given no authority to the mortgagee, or to the court, to have sold the equity, in lieu of enforcing it, without making the bondholders, individually, parties defendant.*

1st. It would have been a breach of trust in the trustee who had only "title to sue," *en autre droit* to have sold his "title to sue" in lieu of enforcing it against Ayer, and his land; the "title to sue" being the only power the trust deed purported to confer upon that trustee. The bondholders had a right to be consulted as to whether their agent should sell the claim it held for collection on their account.

Where the court is made, by its decree, to authorize a breach of trust, the presumption is, that the court has been imposed upon, and the decree is void.

Sheldon vs. Fortescue, 3 P. Wm., 110.
Kennedy vs. Daly, 1 Sch. & LaFroy, 376.

2nd. And even though the trustee, having only a naked trust of the legal "title to sue" Ayer, had assumed to sell that title; (which is precisely what the defendants here insist was done) it was but a title to sue in behalf of the bondholders; under which, the purchasers could only attain the same right. So the members of Ayer's syndicate, by their supposed purchase, could only have bought a right to sue Ayer, for the benefit of the bondholders; and when they

transferred that right to Ayer, they imposed upon him a duty to sue himself; which he could not do; so that the bondholders must do what they have done here, viz: sue on their own title to relief. *1 Story's Eq. Jur., Sec. 395, 2 Vern., 271.*

(d) Even though the equity against Ayer were stated to the Court, in the former foreclosure suit; and though the equity of the mortgagor were sold; the Court, there, was imposed upon, by collusion between Ayer and the trustee, to sell the equity, in ignorance of its existence and value, and in the belief that the title to the 153,000 acres had been lost to the mortgagor; this court will treat the decree purporting to authorize such sale, as extra judicial, and merely the act of the solicitor who penned it.

See cases last cited.

(e) Even though the equity of the *mortgagor* were lawfully sold under the former decree, it was only a sale of whatever right was left in the mortgagor after giving the mortgage, to-wit: to file a bill to get the legal title from Ayer, subject to the equity of the mortgagee to have it charged with the mortgage debt; which could, in no wise, affect the mortgagee's, or bondholder's "title to sue," to charge Ayer's title with that debt, regardless of who should be entitled to the surplus.

III.

But what direction can we properly ask of this Court, in respect to the further representation in the Court below, of the present assignee in bankruptcy; upon whose motion, it seems, the present demurrer

has been interposed, to the end of continuing the fraud which collusively excluded his equitable title to the fee of the 153,000 acres, from being established, which, his duty required to be applied to the payment of the just debts due the bondholders, with surplus to himself as assignee of the bankrupt mortgagor in the former foreclosure suit.

(a) We ask such direction, if the case goes back to the court below, as will bring us aid, instead of opposition to relief from the fraud practiced upon the assignee to get his consent to the decree in the former foreclosure, which, in demurring to this bill, he, and all the other defendants admit to have been perpetrated by collusively excluding the equity of this bill from adjudication in that suit.

IV.

There is no Ground for the Imputation of Laches in Bringing this Suit, to Establish and Foreclose the Plaintiff's Equitable Mortgage.

(a) We first suggest that these defendants ought not be heard to urge that delay in presenting for adjudication the case made by our bill against their ancestor, which, by their demurrer, they admit to have been caused by the active, and effective collusion of that ancestor with our trustee, in excluding the plaintiff's case from presentation, and adjudication under the former foreclosure bill; where it ought to, and would, necessarily, have been presented, and adjudicated, but for that collusive intervention.

(b.) *The suit is brought within the limits of the statute fixing the time in analogous cases of legal mortgages.*

1. The legal limit in Michigan, is 15 years after the debt is due; and enough of the plaintiff's debt, to entitle him to sue in the court below, matured within a year of the date of commencement of suit; and all of his demand for interest matured due inside of the 15 years; the principal yet to become due.

(c.) *There is nothing, in conscience, imputable to the plaintiff's delay in bringing his suit, that would not be equally cogent if this were a legal mortgage we were seeking to prove, and foreclose.*

1. Nothing can be urged as rendering the proof of the plaintiff's case obscure from loss of evidence; for the defendants admit all the facts of the case, as alleged; and it will be in ample time for the defence to urge such an objection, when, the proofs being taken, it shall appear to the court that *time* has obscured the proof of the plaintiff's equity, or raised reasonable presumptions of loss of evidence, which might have rebutted it.

2. Nothing appears, or is presumable, of changed conditions of the property in question; or of the relations of the defendants, or third persons, in respect of it, raising a counter equity against the enforcement of the plaintiff's equity.

3. If it were necessary to the plaintiff's case, to ask affirmative action of the Court in setting aside the former foreclosure decree, as a *prima facie* bar to the plaintiff's equity, something might, perhaps, be urged in respect of the plaintiff's delay in seeking that re-

lief; but that decree, as to the land in question, being a nullity, leaves the plaintiff's case an original proceeding to establish, and foreclose his equitable mortgage, as freely as if there had been no collusive attempt to obscure his equity by means of the solicitor's draft of that former decree; the only necessity of setting forth the former foreclosure proceedings in this bill, being, to anticipate and avoid the pretended estoppel; (under Equity Rule 21;) and to show the collusion between our trustee and Ayer, in that suit, as cause for not bringing this suit in the name of that trustee.

J. P. WHITTEMORE,
Solicitor for Appellant.

125-255

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 25.

MORRIS RICHTER, Appellant,

vs.

GEORGE JEROME et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF ON BEHALF OF THE APPELLEES.

W. D. DAVIDGE,
Solicitor for Appellees.

Press of Thomas McGill & Co., Washington, D. C.

IN THE

Supreme Court of the United States.

No. 25.—October Term 1887.

MORRIS RICHTER, APPELLANT,

vs.

GEORGE JEROME *ET. AL.*, APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Brief on Behalf of the Appellees.

STATEMENT OF THE CASE.

The material allegations of the bill of complaint are as follows:

On the 1st day of March, 1863, Congress, by an act entitled "An act granting lands to aid in the construction of a military road from Fort Wilkinson, Copper Harbor, Keweenaw county, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin," granted to the State of Michigan every alternate section of public lands, designated by even numbers, for three sections in width on each side of said road, to aid in the construction of said military road (fol. 3).

The State of Michigan, by an act approved on the 4th of February, 1864, accepted this grant, and authorized the

Governor to appoint one or more commissioners to dispose of the said lands (fol. 4).

The Governor, under the above authority, appointed Ransom Sheldon commissioner on the part of the State of Michigan, to contract for the construction of the said military road (fol. 4).

On the 8th day of October, 1868, he, as such commissioner, entered into a contract, on behalf of the State of Michigan, with Francis W. Anthony, whereby Anthony agreed to construct the said road, and to complete the same on or before the expiration of the life of the grant, in accordance with designated maps and plans. The consideration moving from the State of Michigan, is thus stated:

"Second. The only consideration to be paid to said Anthony is the land granted by Congress, in aid of the same, to the State of Michigan, and all the benefits, emoluments, rights, and interests arising from said grant are hereby conveyed and assigned to said Anthony to the full extent of the power of said Commissioner to do the same, to have and to hold to him, the said Francis W. Anthony, his heirs and assigns, forever. It is further agreed that, as soon as any continuous ten miles of said road is complete, said Anthony, his heirs or assigns, shall be entitled to apply for and receive a certificate for the number of sections of land granted to aid in the construction of ten continuous miles of said military road. It is also further agreed that said Anthony shall have the first thirty sections of land authorized to be sold by the act of Congress making the grant of land to aid in the construction of said military road; and for these first thirty sections said Anthony agrees to pay all the costs and expenses intended to be provided for by the proceeds of sale of said first thirty sections of land." (Fols. 4, 5, 29, 30, 31, 32).

It was thereafter, on December 5, 1868, agreed that the said Anthony should be entitled to apply for and receive the number of sections of land per mile appropriated for

that purpose by the act of Congress, as soon as two consecutive miles of the said road should be completed, instead of ten miles (fol. 5).

Anthony took into partnership with him for the business of making the road William Harris and William W. Spaulding (fol. 6).

On the 25th of August, 1870, thirty miles of the road had been completed, inspected, and accepted by the State of Michigan, and patents for $47,958\frac{83}{100}$ acres of the said lands had been issued to Anthony (fol. 6, 7, 8).

About November, 1870, he had completed in all eighty miles of the road, and was entitled to receive other patents for 106,000 acres of land (fol. 6).

In the building of the above portion of the road, Anthony, Harris and Spaulding had exhausted their financial resources and credit, and were in debt to the amount of $30,000 and upwards, and their debts were pressing upon them. To relieve themselves of their embarrassment, and to raise the necessary amount to complete the road, F. W. Anthony, for the said firm, entered into a verbal arrangement with Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, directors and stockholders of all the stock of the Portage Lake and Lake Superior Ship Canal Company, acting as well in behalf of the said company as of themselves, to the following effect:

Anthony, Harris and Spaulding agreed to transfer the aforesaid forty-seven odd thousand acres of land, and all their rights under the said wagon-road contract, to the Averys and others. It was agreed that the name of the said corporation should be changed to Lake Superior Ship Canal Railroad and Iron Company, and that thereupon the said Avery and others should convey all of the said lands to the new company as subscription to its capital stock; that upon such conveyance the new corporation should issue coupon bonds in the sum of $3,500,000, secured by its mortgage of the aforesaid and other lands, in order to

raise money for the corporation and the wagon-road enterprise (fol. 7, 8).

In execution of the above verbal arrangement, articles of agreement were made on the 20th of April, 1871, to the following effect (fol. 33):

The said Anthony assigned to the said Averys and others his said contract to build the road, with all the rights, privileges, powers, and claims arising therefrom.

The said Anthony further covenanted with them to execute to them a deed of all the lands already patented to him, on the payment by them of $36,000.

Anthony further covenanted with them to convey to them all the lands to which he then had become entitled, as soon as he should obtain patents for the same.

The said Anthony further covenanted to push forward the work with diligence and dispatch, and to convey all other lands which he should acquire under the contract as soon as patents should be issued to him.

The said Averys, Wild and Conant, parties of the second part, covenanted with the said Anthony to pay him $36,000, within thirty days, upon the execution of the conveyance by him of the already patented lands.

The said parties of the second part further covenanted to pay him $48,000 by the 5th of November, 1871, in six equal installments, payable on the fifth days of June, July, August, September, October, and November, 1871.

They further covenanted to deliver to him, as collateral security for the latter sum, bonds of the Lake Superior Ship Canal Railroad and Iron Company, in the sum of $72,000, upon his conveyance to them of the earned but unpatented lands.

They further covenanted, upon the conveyance of the residue of the lands, to deliver to him their three joint and several notes in payment therefor at the rate of seventy-five cents per acre, one note for one-quarter of the whole amount, payable May 1, 1872; another for a like

amount, payable November 1, 1872, and another for the balance, payable November 1, 1873, and to secure these notes by bonds of the said company, sufficient at 60 per cent. to cover the said notes (fols. 8, 9, 33, *et seq.*)

Anthony, in pursuance of the above agreement, conveyed to the Averys, Wild and Conant 47,598 $\frac{85}{100}$ acres, being the patented lands (fol. 9).

On the first of May, 1871, Perez J. Avery, Alfred Wild and J. Edwin Conant, (William L. Avery not joining in the deed) conveyed to the Lake Superior Ship Canal Railroad and Iron Company, in payment of their stock, "All those 220,000 acres of land, being the same granted by the act of Congress of the United States entitled 'An act granting lands to the States of Michigan and Wisconsin, to aid in the construction of a military road from Fort Wilkinson, Copper Harbor, Keweenaw county, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin,' approved March 3, 1863," reserving from the operation of this deed, 20,000 acres. * * *

The deed contained this clause: "And the said parties of the first part covenant and agree to and with the said party of the second part that they, the said parties of the first part, are seized of a perfect and indefeasible estate in fee-simple in and to the above-described lands and premises" (fols. 9, 39, 40, 41).

On the same day the Lake Superior Ship Canal Railroad and Iron Company conveyed, by way of mortgage to the Union Trust Company of New York, to secure $3,500,000 of its coupon bonds, together with other lands, "200,000 acres of land situate, lying and being in the State of Michigan, fully and particularly described in a full covenant deed made by Perez J. Avery, Alfred Wild, and J. Edwin Conant, and their wives, dated on the first day of May, 1871, conveying the said 200,000 acres of land" (fols. 9, 73, 81).

The Union Trust Company delivered to the directors of

the Canal Company $1,300,000 of the said bonds, on which they raised $36,000, and this sum was paid over to the credit of the Averys, Wild and Conant, with Anthony, Harris and Spaulding, under the above agreement of April 20, 1871; in June and July $16,000 more were raised upon the said bonds and paid to Anthony, Harris and Spaulding on the same account. *The above payments are the only payments alleged to have been made and the only acts alleged to have been done by the parties of the second part in execution of the agreement of April* 20, 1871. The balance of the bonds was sold or pledged, and the proceeds applied to the use of the Canal Company (fol. 10).

The complainant, Richter, is the holder, by purchase in good faith, of two hundred and thirty of the said bonds of the Canal Company, (secured by the mortgage,) and the object of the present suit is to enforce alleged rights in the 200,000 acres of land last above mentioned (fols. 14, 15.) *The bill does not allege when he became such owner.*

It is averred in the bill that the Union Trust Company of New York, trustee as aforesaid, is still in collusion with the members of the syndicate who are living, and with the representatives of those who are deceased, so that it is an unfit representative of the trust under said mortgage to bring this suit, and that the complainant, for that reason, in behalf of himself and of all others like situated and interested, is compelled to bring suit (fol. 25).

His bill seems to have been filed on the 17th July, 1882. (Fol. 100.) The equities of his bill are thus averred:

In the latter part of October, 1871, in consequence of the destruction of credit in New York caused by the fire in Chicago, the canal and wagon-road enterprises were brought to a standstill. The lands pledged to those purposes, being the 200,000 acres of land above mentioned, and other 400,000 acres of land derived by the Canal Company from other grants, were, however, ten times in value more than the money required to complete both enterprises.

The directors of the Canal Company thereupon entered into negotiations with James C. Ayer and other capitalists with a view to raising money sufficient to carry on the said enterprises by means of the bonds already mentioned. These negotiations were pending in the early part of 1872, and were on the eve of success when they were interrupted and defeated by James C. Ayer and a syndicate of which he was a member, in the manner to be related (fols. 15, 16, 17).

In February or March, 1872, James C. Ayer, Theodore M. Davis, receiver of the Ocean National Bank of New York, and other large holders of bonds of the Ship Canal Company, secured by the said mortgage to the Union Trust Company and by three previous mortgages of the company, embracing its other lands, formed a syndicate for the purposes of wrecking the credit of the Ship Canal Company and of obtaining its bonds and property at great sacrifice for the benefit of the syndicate in exclusion of the other bondholders (fols. 17, 18).

Ayer and the other members of the syndicate knew the real value of the lands and the state of the negotiations, as hereinbefore set forth (fol. 17).

Ayer thereupon abandoned his negotiations with the Canal Company, and he and the other members of the syndicate acquired, anterior to the 25th May, 1872, in due form of law, the legal title of a large number of pledged bonds of the Canal Company, at a mere fraction of their face value (fol. 19).

In aid of the plans of the syndicate, and at its suggestion (fol. 21), Ayer, representing to Anthony that negotiations with the Canal Company were a forlorn hope, by the offer to Anthony of a bonus of $20,000 and of money to complete his contract with the State of Michigan, "seduced Anthony from his allegiance" to the Ship Canal Company, and got from him all the benefit of his said contract (fol. 22). This occurred in 1872, after February or March, and presumably after the 25th May (fols. 21, 19).

The defection of Anthony defeated the said negotiations of the Ship Canal Company (fol. 23).

The Canal Company was adjudicated a bankrupt on the 27th of August, 1872 (fol. 13).

Anthony then proceeded to perform his said contract, and procured from the State of Michigan 173,000 acres of the said lands; $95{,}965\frac{91}{100}$ acres were conveyed Ayer in 1873, $57{,}921\frac{11}{100}$ acres on November 10th, 1873, and $19{,}175\frac{48}{100}$ acres on July 13, 1875 (fol. 23). The legal title of these lands was never vested in Anthony. (*Ibid.*)

After the syndicate had procured its bonds as hereinbefore related, it caused the trustees in two of the earlier mortgages to be changed, and gave indemnity to the trustee in the third, and employed Alfred Russell, an eminent lawyer of Detroit, to foreclose these mortgages (fols. 19, 20). He filed three bills for that purpose, respectively, on the 25th May, 1872, 3d July, 1872, and 5th July, 1872 (fol. 12). The change of trustee and the filing of the bill in the first suit occurred before the date at which the syndicate is alleged to have conspired to do these things (fols. 19, 11, 12).

The syndicate thereafter, with intent to assure his title in the said lands to James C. Ayer, enlisted the Union Trust Company in its designs and procured it to allow the syndicate's solicitor, Alfred Russell, to foreclose the mortgage of which it was trustee in the interest of the syndicate, but with the understanding that the foreclosure should be conducted in pursuance of the agreement with Ayer for the protection of his legal title to the said wagon-road lands, as far as possible, under the decree. Accordingly the said Russell filed a bill on the 19th of June, 1875, to foreclose that mortgage, using the name of the trust company and controlling the suit and decree in collusion with the syndicate and in furtherance of its aforesaid design (fol. 24).

In pursuance of the designs of the syndicate and in breach of the trust of the Union Trust Company, the legal title in the said lands was not brought in question and was

protected as far as possible by the decree, and the bill contained the collusive concession that the title to the wagon-road lands had been lost to the Ship Canal Company and had been taken out from under the lien of the mortgage by the reason of a grant thereof to third parties by the State of Michigan (fols. 24, 26).

At the hearing, the bill of the Union Trust Company, "Exhibit A," was made a part of the present bill (fol. 120), and contained the following allegations:

"That to the 200,000 acres mortgaged to the complainant in addition to said 400,000-acre land grants, it is claimed that said company has no title save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder had been patented to other parties" (fol. 125).

"On March the 4th, 1873, Henry S. Wells, a bondholder, secured by complainant's (that is, the Union Trust Company) said mortgage, filed a bill in this Court, impleading, among others, said Francis W. Anthony, said assignees, and this complainant (Union Trust Company), and sought by said bill to subject the said wagon-road land, other than the $47{,}958\frac{85}{100}$ acres, to the lien of complainant's mortgages, and to prevent their conveyance by the State to third parties, and afterwards such proceedings were had that the relief sought was denied; that in article ten of a cross-bill filed by said assigness in this Court September 13th, 1873, said assignees state that certain stockholders of said bankrupt had contracted to buy lands to the amount of 200,000 acres, parcel of a larger amount granted by the State of Michigan for the construction of a military wagon-road, and assuming to be owners, had conveyed the same to the said bankrupt; that said grantors had acquired title to only about 49,000 acres of land, and only about that amount, became vested in said bankrupt (Lake Superior R. R. and Canal Co.); and that the residue had been patented by the State of Michigan to other parties, and lost to said corporation." (fol. 126).

The following is the prayer of the Union Trust Company's bills:

"That said mortgage to complainant be foreclosed, and that the said canal franchise, chattels, and 400,000 acres

of granted lands may be sold subject to the lien of said receiver's certificates and bond-issues of 1865, 1868, and 1870, secured by mortgages aforesaid, and that said $47{,}958\frac{85}{100}$ acres known as "wagon-road lands" may also be sold, and *that all the estate, right, title and interests of the defendants, in the rest and residue of said* 200,000 *acres of wagon-road lands, may be sold*" (fol. 130).

The bill of the present complainant prays that the orator may be allowed by this Court to have the benefit of the said decree, (the decree in the foreclosure suits,) * * * and that the residue of the 200,000 acres of wagon-road lands deeded to James C. Ayer in his lifetime may be by the decree of this Court charged in the hands of the widow, heirs, or trustees of Ayer, with a trust for the payment of the unpaid portion of the said 1,300 bonds and the interest thereon, * * * subject, however, to the lien of the said widow and heirs and said trustee under the will of the said James C. Ayer, for all money advanced by said James C. Ayer in completion of said wagon-road contract (fol. 28).

The four causes were heard together. The decree was not made on the pleadings and proofs, but was drawn by the said Russell and submitted to, by compulsion, by those representing collateral interests, and assented to by the Union Trust Company, in collusion with the syndicate, and by the trustees in bankruptcy of the Ship Canal Company through ignorance of its rights (fols. 24, 25, 26).

The decree declared that a possible equity in the unpatented wagon lands remaining in the Union Trust Company was security for the bonds (fol. 54).

The decree directed the sale of "the property covered and conveyed by the Union Trust Company's mortgage; that is to say, the $47{,}958\frac{85}{100}$ acres of wagon-road lands, together with all the equity of redemption or other right and interest of the said mortgagor corporation in the residue of the said wagon-road lands" (fol. 59, 60).

The complainant accepted a *pro-rata* payment of the oceeds of the said sale (fol. 15).

Under this decree, all the land and property of the Canal Company embraced in the different mortgages, including any equity of redemption or the right or interest of the company in the wagon-road lands, were sold by the master and purchased by Man and Wilson, who subsequently released to James C. Ayer the said equity, right, or interest of the company (fols. 13, 14).

The claimant accepted a *pro-rata* payment out of the proceeds of sale (fol. 15).

Congress on March 6, 1870 (16 S. L., p. 121), extended the time for the completion of the road to January 1, 1872.

The defendants below (the appellees here) demurred to the bill, and it was dismissed.

Argument.

It is submitted on behalf of the appellees that the decree below dismissing the bill was right for the following reasons:

I. The complainant has not shown a case for specific performance; he has not shown that he is entitled to any remedy on his contract, and he has not shown that he is entitled to special relief by way of specific performance.

II. He has not shown any inequitable conduct on the part of Ayer entitling him to relief.

III. All possible rights which he may have had in the subject-matter of the suit have been divested by the decree of a competent Court and a sale thereunder.

IV. He has not prayed that the said decree and sale be set aside, and has shown no grounds for having that done.

V. If he ever had equities in the matter, he has lost his right of action upon them by his laches.

I. The bill shows no right to the lands which a Court of Equity will enforce. The right is claimed under the con-

tract made on the 20th of April, 1871, between Francis W. Anthony, party of the first part, and Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, parties of the second part (R., 18).

The bill, in substance, claims that by virtue of the said contract the parties of the second part, four in number, acquired an equitable right to the lands, and that by the deed of the 1st of May, 1871, made by three of the parties of the second part, the fourth not joining, the said right was conveyed to the Canal Company (R., 5, 21), and was by it, by deed of mortgage of the same date, conveyed to the Union Trust Company (R., 5, 39, 43), and that James F. Ayer acquired the legal title to the lands under such circumstances as rendered him a trusteee for the bondholders under the mortgage. The right thus set up is purely derivative. The bill does not claim that the mortgagee held any right superior to that acquired by the parties of the second part, but merely that the right acquired by the said parties, whatever it was, devolved on the mortgagee; in other words, that the mortgagee was the assignee of the said parties. Thus the controversy is substantially between complainant claiming to represent such assignee and those who hold the legal title acquired by James F. Ayer.

The alleged foundation of the right is the contract.

Any party seeking to enforce the contract must show, first, that he is the equitable owner of the contract, and, secondly, that he has acquired some right thereunder which a Court of Equity, in the exercise of its discretion, ought to enforce.

First, as to ownership: The parties of the second part were four in number. The contract of Anthony was made with them and not with three or any less number. The deed to the Canal Company for the lands, which deed, it is averred, was the assignment of the contract, is made and executed by three only of the parties of the second part, William L. Avery, one of them, not joining (R., 21, 22).

The omission of William L. Avery to assign is not helped or explained by the bill. The bald case is presented of a contract made with four, and the assignee of three filing a bill to enforce. It cannot be pretended that the contract is severable in respect of the parties of the second part. The bill seeks the enforcement of the contract as an entirety (Morgan *v.* Morgan, 2 Wheat., 290). William L. Avery is not made a party to the bill.

Secondly, the contract: Did the parties of the second part acquire under it any such right to the lands as could be enforced by one claiming under them, or three of them?

The contract, on its face, is executory. Anthony covenants that he will, simultaneously with the payment of thirty-six thousand dollars, convey to the parties of the second part the $47{,}958\frac{83}{100}$ acres of land already earned under his contract with the State of Michigan and patented to him. He further covenants to convey the lands to which he had become entitled for work already done as soon as he received patents. He further covenants to push forward the work and to convey the lands to which he may become entitled as soon as in the progress of the work he may be entitled to and receive patents (R., 19, 20).

So much for the covenants of Anthony. The parties of the second part then covenant to pay thirty-six thousand dollars (the consideration at the price agreed for the lands which had been patented) within thirty days from the date of the contract.

They further covenant to make six several payments of $8,000 each, in all $48,000, on the fifth days of June, July, August, September, October, and November, 1871, *and upon the execution and delivery of the bonds for the lands* already earned, to assign seventy-two thousand dollars of the bonds of the canal company at their par value as security for the above six payments, twelve thousand dollars of which bonds at their par value are to be returned by Anthony upon each payment being made.

Thus Anthony was, upon the execution and delivery of the bonds, to have the money or the agreed security. This is the evident meaning of the covenant. He was not to convey for nothing. If a payment had matured and had been made, he had the money, and hence security was unnecessary as to such money. If a payment had matured and had not been made, he had the right to refuse to convey. If a payment or payments had not matured, he was entitled to the security and without it might legally refuse to convey.

The parties of the second part further covenant as to the unearned lands for the agreed price for which the then joint and several notes of the parties of the second part were to be given, all dated the 1st of November, 1871, and payable, one for one-fourth the amount at six months after date; another, for one-fourth the amount at one year; and another, for one-half the amount at two years, the said notes to be secured by the bonds of the Canal Company at sixty per cent. of their par value as collateral (R., 19, 20); that the parties of the second part, *upon* Anthony conveying a sufficient quantity of said lands to equal by estimation at seventy-five cents per acre the amount of the first note, would execute and deliver the first note and deliver therewith a sufficient amount of the said bonds at sixty per cent. of their par value to cover as collateral the amount of the said note, and so also as to the second and third notes.

Again, it is plain that Anthony was not to convey for nothing, but after so doing was to have the joint and several notes of the parties secured by the agreed collateral. Neither was he bound to convey any of the unearned lands if the parties of the second part were in default in respect of any of the six monthly payments maturing as above stated. The contract was an entirety.

Attention is asked to the circumstances under which the contract was made as shown by the bill. Anthony and his copartners had, in the construction of the road as far

as it had progressed, exhausted their financial resources and credit, and owed debts amounting to upwards of thirty thousand dollars, which were pressing them. The main purpose of the contract, indeed, was to raise money to complete the road and realize the anticipated profits (R., 4).

The act of Congress making the land grant, passed on March 3, 1863, required the completion of the road in five years. By the act of May 6, 1870 (16 Stats., 121), Congress extended the time to January 1, 1872. Thus, on the 20th of April, 1871, when the contract was made, there remained only eight months and a few days for the completion of the road.

Under the contract of Anthony with the State of Michigan, the road was to be completed "on or before the expiration of the life of the grant," and the only consideration to be paid to him was the land granted by Congress. (See Contract, R., 16, 17.) The contract further provided he should give bond and security in the sum of ten thousand dollars for the completion of the road in the manner contemplated, (R., 18.) The contract of Anthony with the State of Michigan is incorporated with and in terms made part of his contract of the 20th of April, 1871. The two are to be read together. Thus read, the latter is an executory contract, making provision for the fulfillment of another executory contract.

The payments, which were the consideration of Anthony's contract, of the 20th of April, 1871, were, according to the bill, absolutely essential to enable him to earn the consideration of his contract with the State, or so much of said consideration as had not been earned. By the contract of the 20th of April, 1871, he did not agree to sell the patented lands only, or the patented and earned lands only, but all the lands, patented, earned but not patented, and yet to be earned, and it is so recited in the contract. (R. 19).

Next, what was done under this contract? The bill avers the payment of the thirty-six thousand dollars and the conveyance of the patented lands (R., 5, 6). The title to these lands passed to the Union Trust Company under the mortgage, and they were sold in pursuance of the decree. What next? In June and July, 1871, two payments were made under the contract, amounting to sixteen thousand dollars (R., 6).

Beyond these alleged facts, the payment of the thirty-six thousand dollars, for which the patented lands were conveyed, and the payment of the sixteen thousand dollars, the bill is an absolute blank as to any further execution of the contract by the parties of the second part, under whom the complainant claims. There are no averments showing that the said parties performed their part of the contract, or offered to perform, or were excused from non-performance. Indeed, the bill does not even now tender performance. There is no averment of any demand upon Anthony. There are no averments showing a condition of things which put him in default and gave the parties of the second part at any time a standing in a Court of Equity to ask the enforcement of the contract.

So, likewise, the bill is wholly silent as to the conduct of the parties to the contract and their treatment of it, as well as to the value of the lands when the bill was filed as compared with their value before that time. This bill was filed on the 17th of July, 1882 (R., 54), more than eleven years after the date of the contract, and more than ten years after its fulfillment was contemplated by the parties to it. The bill thus suppresses the history of the transaction for more than a decade, and leaves the Court to act in the dark.

The case, therefore, is one where an ultimate assignee of the parties of the second part utterly fails to show that as between the parties to the contract performance should be decreed. The only postulate of such performance

averred by the bill is the payment of sixteen thousand dollars more than ten years before the bill was filed, and the claim of the bill is, in substance, that this isolated fact entitles the complainant and his associates to a decree for the lands.

The obligation of Anthony under the contract to convey was not independent, but dependent or mutual, and the bill does not aver any facts which rendered the contract enforceable against him. The failure to make the monthly payments and to tender the agreed collateral security for them, and to tender the joint and several notes with the security provided for them, furnishes a complete answer.

The bill is silent as to the time when Anthony is alleged to have repudiated the contract.

But not only does this bill not aver performance or tender it, but its theory is that the complainant ought to have the lands without performance.

The complainant claims as assignee of an executory contract.

But Anthony is not made a party to the bill; neither are the Averys and Conant and Wild, the parties of the second part. How, then, can the contract be enforced? Anthony would be entitled to the consideration agreed on by the contract if it is to be enforced.

He would be entitled to a decree against the said parties of the second part. But they, also, are not made parties. It is to be observed that their alleged assignment created no privity between the subsequent assignees and Anthony. The parties of the second part continued to be liable to Anthony, and they alone.

Symmes *v.* Guthrie, 9 Cranch, 25.
Mallon *v.* Hinde, 12 Wheat., 193, 196.
Findley *v.* Hinde, 1 Pet., 241, 246.
Waterman on Spec. Perf. L. Cases, §§ 68, 69.

So far it has been argued that the complainant could not

recover at law on the contract of Anthony of April 21st, 1871; if that be so, he of course is not entitled to relief in equity. (Waterman on Spec. Perf., § 13.) But even if the complainant has a remedy at law, it does not follow that he has one in equity. The remedy at law on contracts, viz., the award of damages, is more extensive than the equitable remedy of specific performance, and it is specific performance which the complainant is seeking. That is granted, not as of course, but on certain principles peculiar to Courts of Equity.

The remedy on a contract by decreeing its specific performance is largely a matter of discretion, for the denial of it still leaves the complainant his legal remedy.

"Specific execution of a contract is not a matter of absolute right to either party, but is a matter resting in the discretion of the Court, to be exercised upon consideration of each particular case."

Willard *v.* Tayloe, 8 Wall., 557.

The exercise of its discretionary power in such cases by a Court of Equity depends on a variety of circumstances. They are, or some of them are—

1st. That there is an adequate remedy at law.

2d. That the party seeking relief has performed his part of the contract.

3d. That the contract can be enforced against the party seeking relief.

4th. That where he excuses non-performance, he must offer performance.

5th. It seems that the party seeking relief should have demanded performance before filing his bill.

None of these circumstances exist in the present case.

1st. The complainant, so far as appears in his bill, has an adequate remedy at law. The lands in dispute were unimproved Government lands. They are not in the cate-

gory of land which a purchaser wants for his residence or a particular purpose. They were merely a commodity to be bought and sold like merchandize. There is nothing in the bill to show that the specific lands were of any importance to the complainant. On the contrary, he confesses that they were not, by praying to have them sold.

Marble Company *v.* Ripley, 10 Wall., 339.

There is no allegation that Anthony and his partners were insolvent and that the remedy at law is futile.

2d. The complainant has not performed his part of the contract.

As regards such performance as would entitle the complainant to relief in equity, he is entirely in default.

The whole object of the contract of April 20th, 1871, on the part of Anthony, was to obtain money to carry into effect his contract with the State of Michigan before the expiration of the life of the grant, viz., January 1, 1871. To enable Anthony to do so, the other parties to the contract bound themselves to pay him, independently of the purchase-money of the patented lands, $48,000 by November 5, 1871. They paid him of this sum only $16,000. It is confessed that in the winter of 1872 the money still due had not been paid, and that the parties bound to pay it were utterly unable to pay. The failure of Anthony to build the road within the life of the grant, and his resort to Ayer for aid, were due to absolute failure of the other parties to the contract to perform their part of it. After the complete default of the parties of the second part to the contract and the consequent disaster to the enterprise, the complainant comes into Court to pray a specific performance, which will give him the fruit of another's capital and enterprise.

The case is one utterly wanting in that equity which entitles a party to the extraordinary remedy by specific performance. The following authorities sustain these views

Waterman, Spec. Perf., Chap. XIV.

"If a bill for specific performance be brought by a party who is himself in fault, the Court will consider all the circumstances, and decree according to those circumstances.

"Where a considerable length of time has elapsed; where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and value of the land, and there is a want of reciprocity in the obligation, a Court of Equity will not interfere." (Chief Justice Marshall, Brashier *vs.* Gratz, 6 Wh., 528.)

"The situation of the parties, and the circumstances in which the property was placed, deserve serious consideration. The contract was made while a suit for the title was depending, and there is reason to suppose that this circumstance had some influence on the price of the article. We perceive that if any part of the land should be lost, one half of the purchase money should be lost by Brashier. While the suits were depending and the purchase-money unpaid, Brashier became insolvent. Consequently, should the land be recovered, it would be the property at the stipulated price; should it be lost, Brashier could not pay that portion of the price which he was to pay in the event of loss * * * *. No Court could allow one party to hold the other bound, while the obligation was not reciprocal, or to hold himself prepared to avail himself of all favorable contingencies, without being affected by those which were unfavorable." (*Ib*).

"Equity will not relieve (by a decree of specific performance) where it is impossible to place the parties in the same situation and when real fault is imputable to the person praying the aid of the Court." (Pratt *et al. v.* Carroll, 8 Cranch, 471.)

"The plaintiff who seeks for the specific performance of an agreement must show that he has performed, or offered to perform on his part, the acts which form the consideration of the alleged undertaking on the part of the defendant." (Colstan *v.* Thompson, 2 Wh., 336.)

"When the obligation is mutual, the party asking must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show

himself desirous, prompt and eager to perform his contract. If he has been guilty of gross laches, or if he applies for relief after a lapse of time, unexplained by equitable circumstances, his bill will be dismissed." (Dorsey *v.* Packwood, 12 How., 126; Boone *v.* Missouri Iron Co., 17 How., 340.)

"Courts of Equity are not in the habit of entertaining bills for specific performance after a considerable lapse of time, unless on some very special considerations. Even where time is of the essence of the contract they will not interfere where there has been long delay and laches on the part of the party seeking specific performance, and especially will they not interfere where there has, in the meantime, been a great change of circumstances, and new interests have intervened." (Holt *v.* Rogers, 8 Pet., 420; Marble Company *v.* Ripley, 10 Wall., 339.)

3d. It is impossible to enforce the contract against the complainant. The parties cannot be put back into the original situation.

The parties who are bound to pay the purchase-money are not before the Court. They are the parties of the second part in the contract of April 20, 1871, viz., the Averys, Wild and Conant. There was no privity between Anthony or Ayer and the complainant. The Court could not make a decree in this case enforcing the rights of Ayer.

But if the parties of the second part to the contract of April 20th, 1871, were before the Court, no decree could be made against them which would do justice. The payment by them of the contract-money now would not do justice. Anthony does not need the money now; he needed it in 1871, and the stipulation as to time was of the essence of the contract. It comes now too late. Moreover, it would be paid now without risk. The lands must have increased in value, or the complainant would not have begun his suit and asked for the surplus after Ayer's advance had been paid. The result of his paying now

would be that he would get the lands without taking the risks contemplated by the contract.

It will have been seen that the change in the value of property is an important circumstance as against a party seeking the relief of specific performance.

Opinion of Ch. J. Marshall, *supra.*

Brashear *v.* Gratz.

The difficulty of the complainant's case is further increased by the circumstance that the rights of others have intervened. He is pursuing his alleged equity, not against the vendee, but against the vendee's assignee. For all that appears in the bill, the title may not be at present even in that assignee, but may have been transferred to others. There is no allegation in the bill that the lands are still owned by the devisees or heirs at law of Ayer.

4th. The complainant has made no offer of performance. Such offer is necessary in a bill for specific performance.

Waterman on Spec. Perf., § 438.

The complainant has made no offer to pay the contract-money. He proposes in his bill that the land be sold and Ayer be reimbursed out of the proceeds. But that is not the contract under which he claims. It is an offer under a purely hypothetical contract. It furthermore fails entirely to meet the supposable case of a deficiency in the proceeds of the sale of the lands. The complainant proposes only to win—in no case to lose. But his predecessors in title bound themselves to pay absolutely, thereby assuming the risk of the venture.

Porsey *v.* Packwood, 12 How., 156.

5. It has been held that a party seeking relief by way of specific performance should aver, before filing the bill, that he demanded specific performance.

Waterman, Spec. Perf., § 445.

There is no allegation in the bill that any demand was ever made on Anthony or Ayer. It is a fair inference, from the silence of the parties who claimed the benefit of the contract of April 20th, 1871, that they abandoned all effort to perform their part of the contract, and entirely acquiesced in the arrangements between Anthony and Ayer. There is no averment that any objection was ever made by any one to that arrangement; that any notice was given to Ayer that he was interfering with any rights or any demand made upon him for the lands. It was only after Ayer had invested his money and was found to have succeeded in his venture, that complaint was made.

It is submitted that the complainant has failed to show a single circumstance in his case entitling him to the interposition of a Court of Equity.

II. If the complainant has failed to show an equity in respect of the wagon-road lands arising out of the contract with Anthony of April 20th, 1871, he has equally failed to show any independent ground for relief arising out of the conduct of Ayer.

The allegations of the bill as to the conduct of Ayer are so vague that it is difficult to discover what the equities are which the complainant seeks to base upon it. They seem to be two-fold: First, that the scheme of raising money by the mortgage to the Union Trust Company was a fraud; that misrepresentation was employed to effect it; that Anthony was a party to the fraud and misrepresentation, and that the conduct of Ayer in purchasing from Anthony the lands about which the misrepresentation was made renders Ayer liable in equity to make those misrepresentations good out of the land; secondly, that Ayer, by treating with Anthony and inducing him to break his contract with the Canal Company, and by getting the benefit of his contract with the State of Michigan, is bound in conscience to restore the lands obtained under that contract.

FIRST: AS TO MISREPRESENTATION OR FRAUD.

There is no allegation in the bill of fraud, or misrepresentation by any one, in respect to the mortgage scheme, and no claim of relief on that ground is made in the bill. The charge itself, and the suggestion of an equity arising from it, appears for the first time in the complainant's brief.

The history of the mortgage scheme is set out in detail in the bill, but it contains no averment of any fact which can be construed as a fraud or misrepresentation upon the part of either Anthony or Ayer. This will appear by the following extracts from the bill:

"*First.* That the said firm of Anthony, Harris and Spaulding should transfer all their rights under the said wagon-road contract with the State of Michigan to Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, including forty-seven odd thousand acres of land, which had already been patented to said Anthony.

"*Second.* That the said firm of Anthony, Harris and Spaulding, and the said directors of the Portage Lake Corporation should endeavor to procure legislation to authorize said Canal Company to change its name and be known as the Lake Superior Ship Canal Railroad and Iron Company, and to authorize it to receive subscriptions to said corporation, payable in lands instead of money, at an agreed price for the lands between the said corporations and the subscribers to the stock.

"*Third.* That the said directors of the Portage Lake Ship Canal Company should, as individuals, subscribe for the stock of the last-named corporation to the amount of two million dollars, and pay said subscription by their warranty deed of two hundred thousand acres of said wagon-road lands, the legal and equitable title to which they should be enabled to receive through the transfer of the contract rights aforesaid of the said Anthony, Harris and Spaulding.

"*Fourth.* That upon said deed being made to the said Portage Lake Ship Canal Corporation by the said directors, as individuals, the said corporation should issue its coupon bonds to the amount of three million five hundred thousand dollars, to be placed upon the market to raise money

for the said Portage Lake Canal enterprise and for the wagon-road enterprise of said Anthony, Harris and Spaulding; said bonds to be secured by mortgage of the said Portage Lake Canal Corporation to the Union Trust Company of New York, in trust, for the security of the last-named issue of bonds" (fols. 7, 8, and 9.)

It will be seen from these extracts that Ayer was absolutely a stranger to the whole plan and conception of the mortgage scheme. His relation to it began first when he became a bondholder, and in that character was its victim, if wrong was done, rather than its originator.

The closest examination of the above stipulations will not disclose any provision or recital which can be construed as a fraud or misrepresentation on the part of Anthony or as looking in the slightest degree towards either. Whatever Anthony said was true, and whatever he professed to do he had a right to do. His contract of the 20th of April, 1871, with the Averys, Conant and Wild, was in exact accord with the facts and his rights. After he had made this contract Perez J. Avery, Conant and Wild professed to convey to the Ship Canal Company a fee-simple estate to the lands derived from Anthony under his above contract, and covenanted that they had such an estate. Thereafter the Ship Canal Company professed to have and to convey to the Union Trust Company a fee-simple estate in the same lands, but Anthony was a stranger to these conveyances. It is not averred in the bill that he even knew of them.

It thus appears that the present equity is not set up in the bill. Secondly, that Ayer had nothing to do with the mortgage scheme. Thirdly, that Anthony's conduct in connection with it was in every respect proper.

Second. But it is said that Ayer's conduct in inducing Anthony to transfer to him (Ayer) the benefit of the wagon-road contract was inequitable and entitled the mortgagee to be declared the owner of the lands conveyed to Ayer.

Did, then, Ayer, under the circumstances, have the right to make with Anthony the arrangement which he did?

The case intended to be made by the complainant is, that a subsisting contract existed between the Canal Company and Anthony, and that Ayer induced Anthony to break that contract and to give him the benefit of the contract between Anthony and the State of Michigan.

The whole point of the contention, therefore, is, that there was a subsisting contract existing between the Ship Canal Company and Anthony when Ayer intervened. This is the only possible view on which the dealing of Ayer with Anthony can be treated as a wrong to the Ship Canal Company.

The answer, therefore, to the claim is, that when Ayer came forward and assisted Anthony with money to complete his contract with the State of Michigan, no binding contract then, in fact, existed between Anthony and the Ship Canal Company. The bill contains no averment that the contract of the 20th of April, 1871, had, at that time, been performed by the parties thereto of the second part, and that the contract was still in force, and that by such performance Anthony had become bound to perform his duty under it. So far from such an averment, the allegations of the bill make it plain that the parties of the second part to that contract had failed in performance, and, as has been fully argued, Anthony had, by the breach on their part, been discharged from all his obligations to them. It appears, therefore, that the postulate of the complainants' equity, to wit, a subsisting contract performed by one side and binding the other side to perform, has not even been alleged or shown, in fact, to exist. In the absence of such an averment or showing, there is no shadow of support for the complainant's equity.

If the state of the case had been otherwise, and if a binding contract had existed between Anthony and the Ship Canal Company, when Ayer intervened, it is doubtful whether the conduct of Ayer was a wrong either at law or in equity.

No fraud or misrepresentation on the part of Ayer is alleged. The only representation alleged to have been made by Ayer is that the reliance of Anthony on the negotiations of the Ship Canal Company was a forlorn hope. No charge of misrepresentation can be based on this averment. It was the expression of an opinion on the part of Ayer, for it related to a thing which was to happen; it was not an assertion as to any fact which had happened. Error or mistake can be predicated of it, but not falsehood. It is averred that Ayer knew that the negotiations of the Ship Canal Company for money were on the eve of success; but he could not know that an event would happen. He could only know that negotiations were pending. No charge of misrepresentation can be rested on such vague averments.

The bill carefully avoids giving exact dates as to the transactions; but the negotiations of the Ship Canal Company seem to have been in the early part of 1872, and the arrangement of Ayer with Anthony was apparently after the 25th May, 1872. The two statements attributed to Ayer relate to entirely different dates.

This being so, the question would be whether Ayer had the right to obtain the benefit of Anthony's contract with the State of Michigan, if he did so without fraud or misrepresentation.

It is doubtful, even at law, whether any relief can be had in such a case. A late distinguished writer on law has said:

"When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to them constitute the object of a kind of real right which a stranger to the contract can infringe, and thereby render himself answerable *ex delicto?* In other words, does a man's title to the performance of a promise contain an element analogous to ownership or possession? The general principles of the law (nothwithstanding forms

of speech once in use, and warranted by considerable authority) seem to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one without any ill will to Peter prevents Andrew from performing his contract with Peter—may be a kind of trespasser against Peter; for Peter has his remedy against Andrew, and never looked to having any other; and Andrew's motives for breaking his contract are not material. Yet there is some show of authority for affirming the proposition thus condemned. It was decided by the Court of Queen's Bench, in Lumley *v.* Gye (1853), and by the Court of Appeal, in Bowen *v.* Hall (1881), that an action lies under certain conditions for procuring a third person to break his contract with the plaintiff." (Pollock on Torts, p. 450.)

"There must be a wrongful intent to do harm to the plaintiff before the right of action for procuring a breach of contract can be established. Mere knowledge that there is a subsisting contract will not do. Only with these limitations can we safely say that a contract can or does 'impose a duty upon persons extraneous to the obligation, not to interfere with its due performance.' The breach of contract is in truth material only because it excludes the defense that the act complained of, though harmful and intended to do harm, was done in the exercise of a common right." (Pollock on Torts, p. 452–3.)

It seems plain, on principle, that at the most the said conduct constitutes a common-law tort. No attempt has been made to cite any case in which it has been made the ground of equitable relief, and it is confidently believed that no such case exists.

There are no allegations in the bill of any facts to show that for any misconduct on the part of Ayer a full and adequate relief did not exist at law.

There is no allegation in the bill that the complainant acquired his bonds before the agreement between Ayer and Anthony. Such an allegation was essential, for if his bonds were acquired after that agreement, the wrong was not done to him. It was an injury to those who held the

bonds at the time of the agreement, and the remedy for it did not pass with the bonds. (Graham *v.* R. R. Co., 102, U. S., 508.)

The laches of the complainant in enforcing this equity will be considered hereafter.

III. All the rights which the claimant, as mortgagee, may have had in the wagon-road lands were diverted and transferred to others by virtue of the decree in the consolidated foreclosure suits and the sale made thereunder.

It has been so far argued that the complainant never acquired any equitable right in the wagon-road lands. If, however, it should be held that the Ship Canal Company did acquire such right, and that the mortgagee succeeded to it, then it is submitted, on behalf of the appellee, that all such right of the complainant was brought into Court in the foreclosure suit of the Union Trust Company; was prayed to be sold for the benefit of the mortgagee; was decreed to be sold; was sold and was duly assigned and transferred by the officer of the Court to purchasers, and by them to the appellee. All of the facts which constitute this defense on the part of the appellee have been set out in the bill and are properly presented to this Court in the argument of the demurrer.

The question of fact, then, to be determined, is whether the equitable rights in the wagon-road lands, now sought to be enforced by the complainant, were set forth in the bill of foreclosure of the Union Trust Company, were therein prayed to be sold, were decreed to be sold, and were actually sold under the decree.

The statements of the complainant's bill leave no doubt on these points.

The lands in which the claimant is now setting up a right are described in the mortgage under which he claims as "200,000 acres of land, situate, lying, and being in the State of Michigan, fully and particularly described in a full covenant deed made by Peter J. Avery, Alfred Wild, and

J. Edwin Conant, and their wives, dated the fourth day of May, 1871." In the latter deed they are described as "all those 220,000 acres of land, being the same granted by the act of Congress of the United States entitled 'An act,'" &c., (reserving therefrom 20,000 acres,) and the grantors covenant that they have a title in fee-simple.

The bill of the Union Trust Company contained the allegation "that to the 200,000 acres mortgaged to the complainant, (the said lands,) in addition to the said 400,000 acres land grants, it is claimed that said company has no title, save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder has been patented to other parties." It further sets forth that a bondholder, secured by the mortgage to the Union Trust Company, (under which the present complainant takes,) had filed his bill in the United States Circuit Court to subject those of the said lands not patented to the lien of the said mortgage, and that the relief had been denied. The Union Trust Company also averred in its bill that in the last-mentioned suit the assignees of the Canal Company, in a cross-bill, alleged that 49,000 acres of the said lands became vested in the Canal Company, and that the residue had been patented by the State of Michigan to other parties, and lost to the Canal Company.

The bill of the Union Trust Company prayed that "said 47,958.85 acres known as "wagon-road lands" may also be sold, and that all the estate, right, title and interest of the defendants in the rest and residue of said 200,000 acres of wagon-road lands may be sold (fol. 130).

The decree directing the sale of "the property covered and conveyed by the Union Trust Company mortgage, that is to say, the $47{,}958\frac{85}{100}$ acres of wagon-road lands, together with all the equity of redemption, or other right and interest of the said mortgagor corporation in the residue of the said wagon-road lands" (fols. 59, 60).

Under this decree the whole property decreed to be sold was sold to Albon P. Man and Nathaniel Wilson, and the sale was confirmed by the Court (fol. 13, 14).

The complainant was a party to that suit, through his trustee, the Union Trust Company, which fully represented him. He, in legal effect, prayed the sale of the interest in the wagon-road lands mortgaged to him. The assignees of the Canal Company were defendants.

It thus plainly appears from the record that all the rights in the property described in the mortgage to the Union Trust Company were embraced in the decree and have been sold.

The complainant and his co-mortgagees were thus divested by the decree of all the right, whether legal or equitable, which they took under the mortgage. No right under the mortgage is left in the complainant, derived from the mortgage, which he can assert in the present suit.

It is therefore of no consequence to the present controversy what rights the complainant took by the mortgage.

The assertion which seems to be made in the complainant's brief (p. 18), that the mortgage was void, would, if made in the bill, be fatal. In that case the complainant never acquired rights as against Ayer. It makes no difference to the appellee whether the mortgagee never acquired rights or was divested of those he acquired.

But it is argued (complainant's brief, 17, 19), that neither the equitable title or right of the mortgagor nor that of the mortgagee to any relief against Ayer was brought before the Court in the foreclosure suit, and that it could not be adjudicated in that suit because Ayer was not a party to it.

This contention of the complainant furnishes no answer to the appellee's defense arising out of the decree.

Ayer was not a party to the foreclosure suit, and the right of the mortgagor and mortgagee as against him were not put in issue. That alleged right was to obtain from Ayer, as purchaser of land, with notice of the equitable rights of the mortgagor and mortgagee in the land, a conveyance of the legal title to the trustee, the Union Trust Company.

That question, it is true, was not put in issue in the foreclosure suit, but it does not concern the appellee. The decree is relied on by the appellee, not to show that the controversy with Ayer has been adjudicated, but that the right to sue Ayer has passed out of the complainant. That happened when the sale was made to Man and Wilson. It matters not that Ayer is still liable to an action if he, the complainant, cannot bring it.

The decree and sale had the same effect as an assignment of his equity by the complainant would have had, viz., to pass the title to Man and Wilson.

It is not necessary to argue the point made on behalf of the complainant, that in a foreclosure suit the rights of the mortgagee seeking foreclosure are not extinguished by the decree and sale.

The bill sets forth that after the rights of the mortgagee had been sold to Man and Wilson, they were sold and assigned by them to the defendant Ayer. These equities against Ayer were not extinguished by the decree, but by the purchase of them by Ayer and their consequent merger into his legal estate.

IV. The bill does not make a case which entitles the complainant to have the decree and sale thereunder vacated.

It has been shown that the decree and sale operated to transfer out of the mortgagees all rights which they had in respect to Ayer's land, and to vest them in the purchasers at the sale, viz., Man and Wilson. It is impossible, therefore, for the complainant to make out his case while the decree and sale are in force, and to do so it was necessary for him to successfully assail the decree.

It is doubtful on the face of the bill whether he has intended to impeach the decree, and the omission to do so must be fatal on demurrer.

The chief grievance of the complainant as respects the

foreclosure suit is, that by the conduct of Ayer he was not impleaded in it, and the right of the mortgagee to have the legal title gotten in from him was not litigated therein; but if that issue was excluded from the foreclosure suit, and the object of the present suit is to set it up, then the decree worked no harm to the complainant, and he had no object in having the decree vacated. The exclusion of the controversy with Ayer is vehemently complained of in the bill, but that exclusion is not charged to have been, and in fact it was not, an objection to the decree from the complainant's point of view.

It is also asserted that the bill contained an improper concession that the title to the wagon-road lands had been lost. If that allegation had been true in fact, it might have been made a ground for having a resale, but there is not hint in the bill that the complainant is dissatisfied with the sale or wishes a resale. On the contrary, he asked to have the benefit of the decree.

There is no averment in the bill showing or hinting in any way that the effect of the decree in divesting the mortgagee's rights was in the mind of the pleader. It is, therefore, in entire harmony with the allegations and tenor of the bill that it contains no prayer that the decree be vacated. The complainant has not seemed to wish, nor has he asked, to have it vacated.

This view of the bill seems to be taken in the complainant's brief, p. 26, (3).

On the present pleadings, therefore, there is no cause for setting aside the decree.

But if the complainant had pleaded his case sufficiently, he has not shown grounds for relief against the decree. The decree is assailed on the ground that the syndicate (of which Ayer was one) induced the Union Trust Company to commit a breach of trust for the benefit of Ayer by not asserting in the foreclosure suit the equities of the Union Trust Company against Ayer, and thus protecting his legal title.

Was it a breach of trust on the part of the Union Trust Company to frame its bill as it did—that is to say, for the sale of its equitable rights—before getting in the legal title?

The deed of trust to the Union Trust Company furnishes the measure of the trustee's duty. The trust was merely to sell the mortgaged property (fol. 29). There was no duty on the part of the trustee to get in the legal estate from Ayer. The deed contains no hint of any such outstanding estate. It might, indeed, be argued that it would have been a breach of trust on the part of the trustee to bring suit against Ayer. It would have been an act beyond the powers enumerated in the deed of trust.

If the course of the trustee had been discretionary, there is no allegation in the bill that its discretion was exercised against the interests of the parties. There is no averment that the method pursued was not a judicious one. For all that appears in the bill it may have been the best.

Then it may be asked, how did the exclusion from the bill of the question between Ayer and the Union Trust Company protect the legal title of Ayer, as is alleged in the bill? This is not pointed out in the bill nor in the complainant's brief. If, indeed, as alleged, the Union Trust Company was indifferent to its duty, it was better that the controversy with Ayer should not be litigated in a suit of which it had the conduct.

The alleged dealing, therefore, of the syndicate with the Union Trust Company was not only for a lawful purpose, but for one which may in fact have been beneficial to the complainant. The members of the syndicate were *cestuis que trustent* under the mortgage to the Union Trust Company, and had a right to be heard in the management of the trust.

No fraud or misrepresentation in this matter of any kind is imputed to the "syndicate." Its whole dealing is that stated above. The word "collusion" is freely used in the bill, but there is no statement of the acts which con-

stitute the collusion, and an equity cannot be rested on an opprobrious epithet.

It is to be observed that the charge is not made against Mr. Ayer himself, but against the syndicate. The syndicate was a group of persons held together by no legal tie. It is submitted that the allegation is not equivalent to charge Ayer, if any improper conduct had been shown.

It is further averred that the bill contained a collusive concession that the title to the wagon-road lands had been lost to the Ship Canal Company, and taken out from under the lien of the mortgage by reason of a grant to third parties by the State of Michigan, whereby the lien of the said mortgage had been lost.

As a matter of fact, the bill of the Union Trust Company contained no such concession. The averment in the bill is that *it is claimed* the Union Trust Company has no title, save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder had been patented to other parties (fol. 125). This statement is literally true, and refers evidently to the legal title, for the prayer of the bill is, that the "estate, right, title, and interest" in the residue of the wagon-lands be sold.

It is not averred that the "collusive concession" was brought about in any way by Ayer.

It is not averred that any harm was done by the pretended concession. It is not charged that the sale was affected by it; from all that appears, the sale was perfectly fair. No complaint is made of the price obtained at the sale. The complainant is content with the sale, for he asks that he may have the benefit of the decree.

But if the complainant had shown grounds for impeaching the decree, and had framed his bill in that aspect, he has not shown any right in himself to question the decree, because he has not made any averment as to the time at which he acquired his bonds. If any equity exists to vacate the decree, he was bound to show that it inhered in

him by the averment that he owned his bonds when the acts complained of were done. If they were done before he obtained his bonds, they create grounds of relief to those who then owned the bonds, and the remedy did not pass to the complainant with his bonds.

It is a settled principle that an equity such as the one here claimed is not assignable. It differs in this respect from an equity which constitutes an equitable estate. It is a mere contentious right, enforceable only by him who suffered the equitable wrong, and does not pass to creditors or purchaser.

Graham *v.* Railroad Company, 102 U. S., 148.
Mitchell *v.* Homfray, 8 Q. B. D., 587.

It has been so far argued that the complainant has no equity to set aside the decree, and that if he had, he has not properly presented his case. But if this were otherwise, there are certain facts in the complainant's case which stand in the way of his recovery.

The complainant accepted the benefit of the former decree, and has not averred ignorance of Ayer's alleged inequitable conduct at the time he did so. He therefore elected to take under the decree and abandoned his right to question it. It is a settled rule of equity that by exercising an election to take one of two inconsistent rights, the person so electing abandons the other.

Sanger *v.* Upton, 91 U. S., 56.
People's Bank *v.* National Bank, 101 U. S., 181.

The complainant has not offered to return the money derived from the sale under the former decree, and he cannot seek relief against it without such offer.

He who seeks equity must do equity. It is against conscience that the complainant and other bondholders for whom he sues should retain the proceeds of the sale, and at the same time treat the sale as a nullity. But there is no offer of the kind anywhere in the bill.

The case of McQuiddy *v.* Ware, 20 Wall., 19, is very much like the present one, having come up on demurrer. The Court said:

"Apart from all this, the maxim that he who seeks equity must do equity in the transaction in respect to which relief is sought, has not been observed by this complainant. While admitting his indebtedness and that it has waited for ten years or more, he does not make a tender in Court of what is justly due, although he is asking the Court to set aside the proceedings by which his indebtedness was satisfied, on the ground of their absolute nullity. The willingness to pay what is found to be due on the adjustment of the accounts for rents and profits, is not the sort of offer required of a person in the situation of the complainant."

But if the decree should be shown to be voidable, it would be impossible for the Court to set it aside and to do full justice in these proceedings. It is not averred that the lands still belong to Ayer. The rights of third parties may have accrued in the long period since the sale. Man and Wilson are not before the Court, and no opportunity is given them of defending the sale. The bondholders are not before the Court; how are they to be made to refund the purchase-money they have received? They must either have been brought before the Court, or the complainant should have tendered the whole purchase-money derived from the sale.

V. Whatever equities the complainant may have had have been lost to him by his laches.

The bill sets up three equities—

1st. An *equitable title* in the land, arising out of the contract between Anthony and the Averys.

2d. An equity arising out of the alleged misconduct of Ayer in interfering with the contract between Anthony and the Ship Canal Company.

3d. An equity to set aside the decree in the foreclosure suit by reason of alleged misconduct on Ayer's part in respect to it.

The objection of laches applies to each of these alleged equities of the complainant.

From the former part of this argument it will appear that the complainant before he can ask the consideration of the equities on which he rests his case, being the first two above set forth, must impeach the decree, which is an absolute bar to his suit. But even if he should succeed in showing that grounds exist for vacating the decree, he must before obtaining that relief meet the objection that he has been guilty of laches in seeking it. He has, therefore, as regards the decree a two-fold task—to show that it was inequitable and to show that he has attacked it in proper time. Having succeeded so far, he will have next to show that he has in due time asserted the substantial equities of his case. It thus appears that the consideration of this case upon the merits cannot be reached until the following questions have been disposed of: 1st, laches in impeaching the decree; 2d, the validity of the decree; 3d, laches in bringing the action to assert the main equities of the case.

1st. As to the equities affecting the decree and sale.

It has been argued that the decree in the foreclosure suit is a bar to the complainant's claim; that he is not entitled to have his alleged equities even considered while the decree in the foreclosure suit remains in force. The complainant has therefore assailed the decree on equitable grounds. But before those grounds are considered, he must meet the objection that he has come into court too late to present them.

The decree is assailed on the ground that the bill in the foreclosure suit, through the influence of the syndicate, did not properly present the rights of the complainant. The equity, therefore, of the complainant in respect of the decree, arose when the bill was filed, viz., June 19, 1875. The present suit was begun on July 17, 1882. More than seven years had therefore passed between the accrual of the right of action and the action itself.

No excuse is offered for this delay. The complainant does not aver ignorance of the suit. The wrong alleged to have been done, viz., the omission of certain allegations from the bill, was patent upon its face. The situation itself called for active interference in justice to others. The natural result of the suit would be to change the situation of all the parties and to involve the possible purchasers in litigation. It was the mortgagee's duty promptly to interfere if he was dissatisfied with the bill as framed by his trustee.

The decree was made on the 13th March, 1877, and the sale in June or July, 1877, and the complainant accepted payment of the proceeds of it, at what date is not stated. But if the suit proceeded in the usual course, the complainant must have received payment soon after the sale, and he must before then have proved his bonds. His knowledge, therefore, of the defects, or his duty to have such knowledge, occurred so long before he brought this suit that he cannot escape the charge of laches in bringing it.

This Court has expressed itself very clearly and strongly on the subject of laches, as will appear from the two following cases, selected from many like ones:

"The party who makes such an appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the Chancellor may justly refuse to consider his case, on his showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." (Badger *v.* Badger, 2 Wall., 95.)

"We are of the opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the com-

mencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept on their knowledge for several years. Without reference to any statute of limitations, the Courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen." (Harwood *v.* The Railroad Company, 17 Wall., 78; also Grymes *v.* Sanders, 93 U. S., 62.)

2d. As to the equities arising out of the contract.

The complainant's case under this head is, that he, as successor to the rights under the contract of April 20, 1871, obtained an equitable right in the lands conveyed to Ayer.

If that is so, the complainant has delayed too long in asserting that alleged right.

The contract of Anthony (fols. 35, 36, 37) was to convey the lands in question when patented to him. The lands were never actually patented to Anthony, but were patented directly to Ayer (fol. 23), and the complainant's case is that his equity then accrued; 95,965 acres were so patented at an unnamed date in 1873; 57,921 acres on November 10, 1873, and 19,175 on July 13, 1875. At those dates, therefore, rights of action accrued to the bondholders against Ayer. The present complainant, however, slept upon his rights until the 17th July, 1882, when he filed his bill. By delaying so long he deprived himself of the right set up against Ayer under his contract. No shadow of excuse for the delay appears anywhere in the bill; no ignorance of Ayer's acquisition of the legal title is pretended.

The character of the equity relied on imposed on the complainant the duty of exceptional diligence in asserting it. As mortgagee, he is chargeable with knowledge of the documents through which he derived his title, and he was bound to know that its fountain—viz., the agreement of April 20, 1871—gave him no clear, express, well-defined, equitable estate, but, at the best, an equitable right, the very existence of which depended on the construction of an ambiguous contract and the performance of numerous conditions. If he had rights, they were rights about which reasonable doubt was possible. They were rights which Ayer, or any layman, might well have been unaware of. The case was one in which prompt litigation was demanded, and in which the delay in litigation furnished the strongest presumption that the right to litigate had been abandoned.

The case presented by the complainant is therefore one of a doubtful equity, to which the objection of laches peculiarly applies. The objection of laches applies to a formal, express trust; *a fortiori*, it is fatal to a doubtful and constructive trust like the present.

This Court has said:

"But we do not found our judgment upon the presumption of payment; for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a Court of Chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the Court. In matters of account, where they are not barred by the act of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this Court in the case of Piatt *v.* Vattier (9 Peters, 416); and that nothing can call a Court of Chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the Court is passive and does nothing; and there-

fore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court." (McKnight *v.* Taylor, 1 How., 168.)

3d. As to Ayer's conduct in reference to Anthony's contract.

The bill is entirely silent as to the date at which Ayer's alleged interference with the contract of Anthony took place. It is sufficient to assume, for this argument, that it occurred in 1872. The inference, from the allegation of the bill, is that it occurred soon after the 25th May, 1872. Between that time and the bringing of this suit ten years elapsed.

As in the other cases no excuse is offered for this delay. Even if it be assumed, for the purpose of this argument, that any such equity exists as is claimed, it certainly is doubtful in the extreme. If such an equity could be enforced, the complainant was called upon to show the greatest diligence in asserting it. All that has been said already in regard to laches in such a case, and all the decisions cited, apply more strongly to the present point.

There is a circumstance in this case which gives a peculiar force to the objection of laches. Mr. Ayer died in 1878 (fol. 26). The complainant had ample time while Mr. Ayer lived to make his charges and demand. He has chosen to wait till Mr. Ayer is dead to charge him with collusion and wrong and misrepresentation. Will a Court listen to charges delayed until the person affected by them and best able to answer them is dead?

Attention is asked to the point raised in the other brief on behalf of the appellee, viz., that the complainant's suit is barred by statute. By a statute of Michigan (8698—2 Howell's Annotated Statutes), it is provided that suit must be brought "within five years, where the defendant claims title to the land in question by or through some deed made upon a sale thereof by a sheriff or other proper ministerial officer under the order, judgment, decree, or process of a

Court or legal tribunal of competent jurisdiction within the State."

If, therefore, the complainant ever had any of the rights which he claims; if he had an equity to set aside the decree; if he had an equity arising out of Ayer's alleged conduct; if he had positive rights under the contract of April 20th, 1871, he has slept upon them, and slept unreasonably long. It is against conscience for him, now waking from his sleep, to ask to have the entire new state of things disturbed which grew up while he slept, and which would have thrust itself upon his vision if his eyes had been open.

W. D. DAVIDGE,
Solicitor for Appellee.

MAR 22 1887
JAMES H. McKENNEY

Supreme Court of the United States

OCTOBER TERM, 1886.

No. 245.

MORRIS RICHTER,
Appellant,
vs.
GEORGE JEROME, Survivor of GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company *et al.*

BRIEF FOR DEFENDANTS, THE AYERS.

Appeal from the Circuit Court of the United States, for the Western District of Michigan.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1887.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1886.

MORRIS RICHTER,
Appellant,
vs.
GEORGE JEROME, Survivor of GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company *et al.*
No. 245.

BRIEF FOR DEFENDANTS THE AYERS.

The issue in this case is on general demurrer to the bill of complaint. The substantive averments of the bill are as follows:

That in July, 1864, the Portage Lake and Lake Superior Ship Canal Company was organized into a corporation to construct and operate a canal from the most westerly point of Portage Lake through a neck of land called "the Portage," into Lake Superior. (R., f. 2.)

That by an act of Congress of March 3, 1865, a grant of 200,000 acres of land was made to the State of Michigan to aid the construction of such a canal. (R., f. 2.)

That on March 18, 1865, this land grant was accepted by the State of Michigan, and conferred on the canal company. (R., f. 2.)

That by an act of Congress of July 31, 1866, another

grant of 200,000 acres of land was made to the State of Michigan to aid in the construction of a harbor at Portage Lake and a ship canal from Portage Lake to Keweenaw Point. And it was expressly provided in this act that the land so granted should inure to the use and benefit of the canal company, in accordance with the legislative act of the State of Michigan conferring upon that company the previous grant. (R., f. 3.)

That, under date of July 1, 1865, the canal company issued its bonds in the aggregate amount of $500,000, and to secure their payment made a mortgage to Columbus C. Douglass, as trustee, upon all the lands embraced in the first land grant mentioned. Douglass was subsequently succeeded in the trust by D. Randolph Martin, who in turn was succeeded by John L. Sutherland. (R., f. 11 and 47.)

That subsequently, on the first day of July, 1868, the canal company made another issue of its bonds in a like amount, to wit, $500,000, and secured the same by a mortgage upon both grants of land to Thomas T. Davis and D. Randolph Martin as trustees. Lucien Birdseye subsequently succeeded Martin and Davis in this trust. (R., f. 11 and 49.)

That on the 1st day of July, 1871, the canal company made a third mortgage to Charles L. Frost, trustee, upon all its lands and its canal and other property to secure an issue of its bonds in the aggregate amount of $1,250,000. Thomas N. McCarter subsequently succeeded Frost as such trustee. (R., f. 11 and 50.)

That by an act of Congress of March 1, 1863, a grant was made to the State of Michigan, to aid the construction of a military wagon road, from Fort Wilkins to Fort Howard, of every alternate section of public land desig-

nated by even numbers, for three sections in width on each side of the road to be constructed. (R., f. 3.)

That by an act of February 4, 1864, the State of Michigan accepted the grant, and authorized the Governor of the State to appoint a commissioner to dispose of the land pursuant to the purpose of the grant, and that the Governor appointed Ransom Sheldon such commissioner. (R., f. 4.)

That on October 8, 1868, Sheldon entered into a contract as such commissioner with one Francis W. Anthony, by which it was agreed that the State of Michigan should grant to Anthony the land held for construction of the military road, in consideration of Anthony's building the road. By the terms of the contract, as soon as Anthony completed a continuous ten miles of the road he was entitled to apply for and receive a proportionate number of acres of land. Anthony gave a bond to the State of Michigan for the performance of his undertaking. (R., f. 5 and 32.

That on December 5, 1868, Sheldon made a supplemental contract with Anthony, giving him the right to apply for and receive, as soon as two consecutive miles of road should be completed, a proportionate number of sections of land per mile. (R., f. 6.)

That subsequently Anthony united with himself, as copartners in the construction of said road, William Harris and William W. Spalding. (R., f. 7.)

That in the month of November, 1870, Anthony, Harris & Spalding had completed about 80 miles of the road, in accordance with the terms of the contract, in doing which they had exhausted their financial resources and credit, and were in debt in about the sum of $30,000; and that they were entitled to receive conveyance from the State of Michigan of about 153,000 acres of land for the work done. (R., f. 7.)

That on the 25th of August, 1870, 30 miles of the road

had been inspected and accepted by the Board of Control of Michigan, and that Anthony had received patents or title deeds, bearing date the 25th day of August, 1870, for 47,958.85 acres of land on account of the work done, and was entitled to receive in November of that year conveyance of 106,000 acres more. (R., f. 7.)

That Anthony, acting for the firm of Anthony, Harris & Spalding, entered into a verbal arrangement—the date of which is not named—with the directors of the canal company, acting both in their representative capacity and in their individual and personal capacities as shareholders of the company, for raising the necessary money to enable Anthony, Harris & Spalding to complete the construction of the wagon road and secure the remainder of the land, as follows (R., f. 8):

1st. Anthony, Harris & Spalding were to transfer all their rights under the contract for construction of the road, including their title to the 47,958.85 acres of land earned, to Perez J. Avery, William L. Avery, Alfred Wild and J. Edwin Conant. (R., f. 8.)

2d. Anthony, Harris & Spalding and the directors of the canal company were to procure the necessary legislation to authorize the canal company to change its name to that of the Lake Superior Ship Canal, Railroad and Iron Company, and to take and hold land in payment for stock subscriptions, at a price for the land to be agreed upon between the corporation and the subscribers to the stock. (R., f. 8.)

3d. That the directors of the canal company were then to subscribe for the stock of the company to the amount of $2,000,000, and to pay for the stock by a warranty deed of 200,000 acres of the land granted for construction of the military road, the legal and equitable title to which they

were to receive through transfer from Anthony, Harris & Spalding. (R., f. 9.)

4th. Upon the directors of the canal company making the deed of this land to the company, the company should issue its coupon bonds to the amount of $3,500,000, secured by a mortgage of the canal company to the Union Trust Company of New York, and that these bonds should be used to raise money for completing the wagon road and canal. (R., f. 9.)

That this verbal arrangement was carried out "as far as practicable," as follows (R., f. 9):

Averys, Wild & Conant co-operated with Anthony, Harris & Spalding to procure, and succeeded in procuring, legislation from the State of Michigan as contemplated. The canal company was reorganized under the name of the Lake Superior Ship Canal, Railroad and Iron Company. Anthony conveyed the 47,958.85 acres of land to Averys, Wild & Conant, and transferred to them the rights of the firm in the contract for construction of the road—Harris & Spalding, his co-partners, consenting thereto. Averys, Wild & Conant then subscribed for the $2,000,000 capital stock of the company, and paid for the same by a warranty deed to the corporation of 200,000 acres of the military wagon road lands. The canal company made and issued its coupon bonds in the amount of $3,500,000, and to secure their payment executed a mortgage to the Union Trust Company of New York upon all its property, including the 200,000 acres of land last named. Bonds secured by this mortgage to the amount of $1,300,000 were issued. (R., f. 10.)

That the directors of the canal company and Anthony, Harris & Spalding, by use of these bonds, raised $52,000, $36,000 of which "was paid over to the credit of Averys, Wild and Conant, with said Anthony, Harris & Spalding, and the remainder of which was paid to Anthony, Harris

& Spalding ;" and that the remainder of the bonds issued (what amount is not stated) were sold or pledged, and the proceeds applied to the use and benefit of the canal company. (R., f. 11.)

That bills to foreclose the mortgages were filed in the United States Circuit Court for the Eastern District of Michigan, as follows:

By John L. Sutherland, May 15, 1872.

By Thomas N. McCarter, July 3, 1872.

By Lucien Birdseye, July 5, 1872.

By the Union Trust Company of New York, June 19, 1875.

That Alfred Russell was solicitor for complainants in each of these several cases. (R., f. 13.)

That subsequently George Jerome and Fernando C. Beaman, who were assignees in bankruptcy of the canal company (declared a bankrupt on the 27th of August, 1872), were made defendants in these cases by proper amendments of the bills of complaint. (R., f. 13, 14.)

That on September 13, 1873, Jerome and Beaman, assignees, &c., filed a cross-bill in the Sutherland foreclosure case, which on February 12, 1877, by an order of court, was made a cross-bill to the several foreclosure cases. (R., f. 14.)

That on March 13, 1877, a final decree of foreclosure was entered in the several cases. (R., f. 14.)

That in June or July, 1877, the entire property covered by the mortgages was sold pursuant to the decree to Albon P. Man and Nathaniel Wilson, and a report of the sale duly made and filed with the court, which was subsequently confirmed in accordance with the practice of the court. (R., f. 14.)

That Man and Wilson afterward released to James C. Ayer the right or equity of redemption in the 200,000 acres of the military wagon road lands purchased by them at the mortgage sale, the said Ayer having previously acquired legal title thereto. (R., f. 15.)

That Man and Wilson subsequently disposed of the remainder of the land and property purchased by them at said sale to a corporation organized to receive and hold the same in the interest of a syndicate formed as and for the purpose subsequently in the bill stated. (R., f. 15.)

That the complainant holds and owns 230 of the bonds issued under and secured by the mortgage to the Union Trust Company of New York, with the interest coupons thereon. (R., f. 15.)

That he received the sum of $9 upon each of these bonds from the proceeds of the sale under the foreclosure of the mortgage. (R., f. 16.)

That in 1871 business enterprises requiring credit were embarrassed by the Chicago fire.

That the enterprise of building said canal and military wagon road suffered with others. (R., f. 16.)

That the lands granted and pledged for this work were many times the value of the money required, and it was only necessary to bring this fact to the knowledge of capitalists to secure the requisite means. (R., f. 16.)

That Anthony, Harris & Spalding and Averys, Wild & Conant and the directors of the canal company, acting in concert, were on the eve of success in raising the needed money when their efforts were interrupted and defeated by James C. Ayer, as subsequently stated. (R., f. 16, 17.)

That in December, 1871, Averys, Wild & Conant and the canal company had obtained a large credit at the Ocean

National Bank of New York, with which they had pledged the bonds of the canal company. (R., f. 17.)

That on the 12th day of December, 1871, this bank, by reason of the credit given to Averys, Wild & Conant and the canal company, became embarrassed, suspended payment, and Theodore M. Davis, of New York, was appointed its receiver under the national banking law. (R., f. 17.)

That Davis, as receiver of the bank, knowing the great value of the lands in question, and having full knowledge of the arrangement entered into between Averys, Wild & Conant and Anthony, Harris & Spalding, and of the efforts made and contemplated to be made for raising the necessary money to complete the canal and wagon road, conceived the design of wrecking the credit of the canal company in the interest of a syndicate to be formed by a combination of certain of the bondholders of the company to the exclusion of other bondholders, and of obtaining possession of the property of the company. (R., f. 17, 18.)

That at the time Davis was appointed receiver of the bank, negotiations between the directors of the canal company and James C. Ayer and other creditors were pending which promised to be successful in realizing the money to complete the canal and wagon road, when Davis induced Ayer to enter into his syndicate and to abandon further negotiations with the directors. (R., f. 17.)

That in February or March, 1872, the Davis and Ayer syndicate was completed by entering into written articles of association. Davis then, as Receiver of the Ocean National Bank, held and controlled bonds of the canal company issued under the several mortgages; J. Boorman Johnston & Co., a mercantile firm of New York, held other of the bonds, and James C. Ayer & Co. held bonds under the three first mortgages; all of the bonds of these several parties being held as collateral security for money loaned to the canal company. (R., f. 18, 19.)

That the syndicate agreed to pool their bonds and debts and to depreciate the value of the bonds upon the market. And as a means of doing this, they were to sell the bonds under the pledges, and secure to themselves the legal title, by purchasing for each other. (R., f. 19, 20.)

That by this method the legal title was procured to the bonds for a mere fraction of their face value. (R., f. 20.)

That having procured the legal title to the bonds in the manner stated, the members of the syndicate agreed to employ Alfred Russell, of Detroit, to foreclose in their interest these various mortgages given by the canal company, and that it was in furtherance of this scheme that John L. Sutherland was substituted for Douglass as trustee of one of the mortgages, and that Lucien Birdseye and Thomas N. McCarter became trustees respectively in two of the other mortgages. (R., f. 20–21.)

That before the foreclosure bills were filed, the directors of the canal company and Anthony, Harris & Spalding had nearly completed arrangements for borrowing the needed money, when the members of the syndicate thwarted them by the following means, viz.:

They agreed that James C. Ayer should procure the title of the State of Michigan to the military wagon road lands which had not been theretofore patented to Anthony, Ayer advancing sufficient money "to buy over said Anthony, Harris & Spalding from their allegiance to said canal company under their said contract with Averys, Wild and Conant, and sufficient to complete said Anthony's contract with the State of Michigan, so assigned to the said Averys, Wild and Conant as aforesaid." (R., f. 22.)

The syndicate consulted with their counsel, Russell, and subsequently, under his advice, with Seager, and the result was that Ayer agreed with Seager to indemnify him from all costs, charges and expenses that he might incur in getting the legal title then in the State of Michigan to the

remainder of the military wagon road lands, which was ultimately to be transferred to Ayer. That Seager represented to Anthony, Harris & Spalding that their reliance upon Averys, Wild & Conant and the canal company for money, etc., was hopeless, and gave them $20,000 to abandon the arrangement made with Averys, Wild & Conant and the canal company, and to finish the work of constructing the road under Anthony's contract with means to be provided by Seager. (R., f 23.)

That Seager, Anthony, Harris & Spalding subsequently completed the road accordingly, and procured title from the State of Michigan to 173,000 acres of the lands, which title was transferred to Ayer; 95,965.91 acres of these lands were indirectly deeded by the State to Ayer in 1873; 57,921.11 acres were deeded directly to him by the State on November 10, 1873; and the remainder were deeded by the State directly to him July 13, 1875. (R., f. 24.)

That as soon as Anthony, Harris & Spalding had been induced to abandon the arrangement with Averys, Wild & Conant and the canal company, the syndicate published the fact, which resulted in defeating the pending negotiations of the directors of the canal company for the money required. (R., f. 24.)

That with intent to assure legal title to the wagon road lands in said Ayer, the Union Trust Company of New York, as trustee, was induced to allow Russell, solicitor of the syndicate, to foreclose its mortgage, the understanding being that the foreclosure should be so conducted as to protect Ayer's title as far as possible. (R., f. 25.)

That on the 19th day of June, 1875, the bill to foreclose this mortgage was filed by the Union Trust Company, Russel acting as its solicitor, and being paid by the syndicate for his services in consideration of his conducting the proceedings in its interest. (R., f. 25.)

That the legal title to the wagon road lands was thus kept

from being brought into question in the bill of complaint of the Union Trust Company in the foreclosure proceedings, and was protected as far as possible by the decree entered. (R., f. 25.)

That the Union Trust Company is still in collusion with members of the syndicate, and therefore not a fit party to institute this suit. (R., f. 26.)

That the decree of foreclosure was not in fact an adjudication by the court, upon consideration of pleadings and proofs, of the questions involved in the several causes in which it was entered, but was drawn by Russell, representing the syndicate, submitted to on compulsion by those representing collateral interests, assented to by the Union Trust Company in collusion with the syndicate, by Jerome & Beaman as assignees through ignorance of the rights and equities of the canal company against the title of Ayer to the lands in question, they being misled by the failure of the Union Trust Company in its bill of foreclosure to make Ayer a party defendant, charging his title to the lands with a trust for the payment of the mortgage, and by the concession in the bill that the undeeded lands have been lost to the canal company and taken from under the mortgage by the grant from the State of Michigan to others. (R., f. 26, 27.)

That in 1878 James C. Ayer died, leaving a widow and children surviving him as legal heirs, and the legal title to his estate, including the wagon road lands in question, vested under his will, in Frederick F. Ayer, Benjamin Dean and Jacob Rogers. (R., f. 27, 28.)

The prayer of the bill is, that the complainant may have the benefit of the decree of foreclosure; that the 200,000 acres of wagon road lands deeded to Ayer may be charged with a trust for the payment of the unpaid portion of the 1,300 issued and unretired bonds secured by the Union Trust Company mortgage, and that the lands may be sold

to pay the amount due on the bonds, subject, however, to the lien of the widow and heirs of James C. Ayer and of the trustees under his will, for money advanced by Ayer to complete the wagon road contract. (R., f. 28, 29.)

There are several schedules referred to in the bill :

1st. Schedule A, is Anthony's contract with the State of Michigan for constructing the military wagon road. Its provisions are unimportant, except those stated in the bill. (R., f. 30, 33.)

2d. Schedule B, is the agreement between Anthony and Averys, Wild & Conant. It purports to have been executed April 20, 1871. (R., f. 33, 39.)

It recites the fact of Anthony's agreement with the State of Michigan to build the road ; that he had so far performed as to have received a deed for 47,958.85 acres of land ; that he had earned and was entitled to receive "about 96,000" acres more ; that on completion of the road he would receive 116,042 acres additional ; that he had agreed to sell ("and does hereby sell") to Averys, Wild & Conant all the land theretofore deeded to him, and that to be thereafter deeded to him, at the price of 75 cents per acre, Averys, Wild & Conant undertaking to pay therefor as follows : $36,000 within thirty days from the date of the agreement ; $48,000 in six equal monthly instalments on the 5th days of June, July, August, September, October and November following ; and the remainder in three equal payments, the first to be made six months from November 1, 1871, and the two others respectively in one and two years thereafter, the last three payments to be secured by the notes of Averys, Wild & Conant, and the bonds of the canal company "at sixty per cent."

It then grants and conveys to Averys, Wild & Conant Anthony's agreement with the State of Michigan, together with the "privileges, powers and claims arising from the same;" covenants to convey to Averys, Wild & Conant, or to persons they should name, the land theretofore deeded by the State to Anthony; and to convey in like manner the additional land he had earned, amounting in all "to one hundred and fifty thousand acres more or less;" covenants that Anthony shall push forward the work of constructing the road, and that he will convey to Averys, Wild & Conant additional land as fast as earned and patented to him, until they should receive title to "260,000 acres more or less."

Averys, Wild & Conant covenanted to pay the $36,000 in 30 days from date of the agreement on receiving a deed from Anthony of the 47,000 and odd acres conveyed to him by the State; to pay the instalments of $8,000 each at the dates mentioned in the recital, and on receipt from Anthony of a conveyance of the remainder of the earned lands, to assign and deliver to him $72,000 of the canal company's bonds (of what issue is not stated), as security for the six $8,000 payments, Anthony to return $12,000 of the bonds for each payment made; and on receiving conveyance from Anthony of the residue of the 260,000 acres of land, to execute and deliver to him their notes, payable as stated in the recital, for the remainder of the aggregate price for said land, at 75 cents per acre, together with the canal company's bonds as collateral security in an amount, at 60 per cent. of their face, equal to the notes, etc., etc.

3d. Schedule C is a deed of conveyance by one of the Averys and by Wild and Conant and their wives to the canal company, which, after reciting that they were the owners of 200,000 acres of land (the military wagon road land), and that they had subscribed for 500 shares, at $100 a share, of the canal company's capital stock, and had agreed to pay for the same by a deed to the company of 200,000

acres of this land, proceeded in the usual form of such instruments to convey the title.

The date of this deed is May 1, 1871. (R., f. 40–43.)

4th. Schedule D is the decree of the court foreclosing the several mortgages named in the bill. It purports to have been made after argument of counsel, and to be the adjudication of the court. (R., f. 44–69.)

The only parts of it that are of any significance on this issue are as follows:

It finds that the canal company executed its bonds and a mortgage to the Union Trust Company of New York to secure them; that 1,300 of the bonds were issued; that the mortgage was "intended to cover 200,000 acres of land, known as the wagon road lands," and did "actually cover 47,958.85 acres of these lands," on which the 1,300 bonds were a first lien; that title to the remainder of "the wagon road lands" passed from the State to third parties, so that the mortgage covered only "a possible equity" therein, which equity was also a security for the 1,300 bonds; and it orders the 47,958.85 acres of wagon road lands and the equity in the remainder of those lands, and the equity of the canal company in the remainder of the property covered by the Union Trust Company mortgage, to be sold as one parcel.

The final paragraph of the decree provides that any of the parties to the several suits, and any parties interested in the various issues of bonds, etc., might apply to the court for any further order or relief.

5th. The Union Trust Company foreclosure bill has found a place in the record, under a peculiar certificate of the district judge, although the bill of complaint in this case does not make it an exhibit, or refer to it in such way as to incorporate the averments of it into itself. (R., f. 121–132.)

Should the bill be held to be a proper part of this record,

the only averments of it that can be deemed of importance to the case are as follows: That a claim had been made that the canal company had no title to any of the land except the 47,958.85 acres, the remainder having been patented to other parties; that one Wells, a bondholder under the Union Trust Company mortgage, had instituted suit in the same court, in which he sought to subject the entire 200,000 acres of wagon road land to the mortgage, and that relief was denied; that the assignees in bankruptcy of the canal company, in a bill filed by them, had alleged that the canal company had secured title to only about 49,000 acres of the land, and that the remainder had been patented by the State of Michigan to others. The prayer was for a sale of the 47,958.85 acres, and of "all the estate, right, title and interest" of the canal company in the "residue of said 200,000 acres of wagon road lands."

Schedule Ca is the mortgage or deed of trust of the canal company to the Union Trust Company. It bears date May 1, 1871, and appears to have been acknowledged by the canal company on the 10th of May. (R., f. 74–94.)

It recites the conveyance by Perez Avery and Wild and Conant and their wives, of "200,000 acres" of the wagon road land, and in the usual terms conveys the land, together with other property, to the Union Trust Company in trust to secure payment of the bonds.

Now, what is the theory of the bill, the actual case for equitable relief which complainant is supposed to have and to have stated in his complaint? I have experienced much difficulty in determining from the bill itself what this theory is, but, by the aid of the oral and printed arguments made in complainant's behalf in the court below, I make it out to be as follows, namely:

That the interest of Averys, Wild & Conant in the contract made by them with Anthony (Exhibit "B"), and in the 200,000 acres of land, by the deed of Perez J. Avery, Wild and Conant to the canal company, and the latter's mortgage to the Union Trust Company, passed to the last named company, subject to the right and duty remaining in Anthony, Harris & Spalding to complete the wagon road and secure legal title to the land in the canal company; that Anthony, Harris & Spalding failed in this duty by procurement of James C. Ayer, who, by their aid, obtained the legal title to himself, he having full knowledge of the Anthony contract with Averys, Wild and Conant, of the conveyance to the canal company, the subsequent mortgage to the Union Trust Company, etc.; that the decree in foreclosure of the Union Trust Company mortgage, and the sale made in pursuance of it, did not include the right of Averys, Wild & Conant under and in their contract with Anthony and in the 200,000 acres of land, but purposely avoided doing so; and that this contract-vendee-interest which was covered by the mortgage, not having been included in the former decree, complainant, as mortgagee thereof, is entitled to have it subjected to decree and sale. There are also some averments of the bill which faintly hint of a right in complainant and his co-bondholders which is stated in the prayer, to have what, in legal effect, would be a specific performance of the Anthony, Harris & Spalding contract.

First—The fundamental error in this lies in the assumption that the foreclosure decree did not embrace every interest, legal and equitable, in the land and in the contract between Anthony and Averys, Wild and Conant in relation to it, which passed to the Union Trust Company by the mortgage.

The decree finds that "the said Union Trust Company mortgage was also intended to cover 200,000 acres of land known as the wagon road lands, which were acquired from the State of Michigan by one Francis W. Anthony, and which were subscribed to the capital stock of said company under the provisions of the laws of the State of Michigan; that the said Union Trust Company mortgage did actually cover 47,958.85 acres of the said wagon road lands, to wit, the lands particularly described," etc. . . .

"That the title to the remainder of said wagon road lands passed from the State of Michigan to third parties, so that as to the same the said Union Trust mortgage covers only a possible equity," etc. (Rec., p. 29, folio 54.)

Again, "that said Union Trust Company mortgage . . . . is also a first lien upon any right or estate of the said mortgagor company in and to the rest and residue of the said 200,000 acres of wagon road lands." (Rec., p. 30–31, folio 57.)

And it was decreed "that the property covered and conveyed by the said Union Trust Company mortgage, that is to say, the 47,958.85 acres of wagon road lands, . . together with all the equity of redemption or *other right or interest of said mortgagor corporation in the residue of said wagon road lands*, ... shall be offered, struck off and sold." (Rec., p. 32, folio 60.)

It was further adjudged and decreed "that the said defendants the Lake Superior Ship Canal, Railroad and Iron Company and George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal, Railroad and Iron Company, and *all persons claiming or to claim from and under them*, be *forever barred and foreclosed* of and from all equity of redemption *and claim of*, in and to said . . . . *200,000 acres of wagon-road lands, etc.*" (Rec., p. 35, folio 66.)

It seems to be too clear to require argument that what-

ever passed to the Union Trust Company and the bondholders under the mortgage is covered by this decree. It is true that the Anthony, Avery, Wild & Conant contract is not named, and it was not necessary that it should be. The general words used are broad enough.

The utmost that can be claimed as to the character and extent of the canal company's interest in the 200,000 acres of wagon road land is that it consisted of a legal title to a little less than 48,000 acres, and a contract right to the remainder, and that it mortgaged these two interests. No matter what were the words of description used, if the mortgage conveyed any interest in the portion of land remaining in contract, it was this vendee equity. The decree ordered and adjudged its sale, without any attempt either to define or describe it, as an equitable interest to satisfy the mortgage debt.

By the term "property," as applied to land, all titles are embraced, legal and equitable, perfect and imperfect, inchoate and complete, and rights which lie in contract, executory as well as executed; and such rights "at least as between private parties, can be transferred by mortgage or be reached by judicial process."

Bryan vs. Kennett, 113 U. S., 180, 192-4.
Hornsby vs. The U. S., 10 Wall., 224, 242.
Soulard vs. U. S., 4 Peters, 511.

If there was any equitable interest of the canal company in the residue of the wagon road land, it had the right to sell or incumber such interest, and a court of equity could sell it under its decree.

Wing vs. McDowell, Walker's Ch., 175, 181.
Freedman's Savings and Trust Co. vs. Earle, 110 U. S., 710.

It was urged in the court below, and will no doubt be

repeated here, "that the mortgage was inoperative in respect of the unpatented wagon road lands until equity should come to its support, as the land and not the contract was the subject of the mortgage." The land was the thing described, as in all cases of a mortgage or conveyance where land is the subject matter of it. But in fact and in law, the title or interest of the mortgagor or grantor only is affected. One who has a tax title to land, or any semblance of title or interest, conveys, not by specific description of his title or interest, but by description of the land. It was intended to mortgage what was in fact mortgaged. This is a legal presumption in the absence of averments or proof to the contrary.

The legal title not being in the mortgagor at the date of the mortgage, was not covered by it. The canal company took, if anything, simply an equitable interest in the unpatented lands, and this only it could mortgage. The Union Trust Company acquired this interest by virtue of the mortgage. Its bill was filed to foreclose the mortgage on this interest and subject it to sale in satisfaction of the mortgage debt. The decree of foreclosure and sale embraced this interest, and it was sold. The complainant received his proportion of the proceeds, be it more or less. Had each bondholder realized 75 or even 95 per cent. of the principal and interest of the bonds, the right of suit contended for by the complainant would have been the same for the remainder of the debt.

What right or interest did the purchaser at this foreclosure sale obtain? He bought and paid for something. What was it? Suppose this equity in the land had been sold by itself, and a stranger to all the interests had bought it and paid $1,000,000 for it, and the money had been distributed among the bondholders, he would have acquired the interest, both in kind and degree, that was conveyed by the mortgagor to the Union Trust Company. This is just

what is always accomplished by a mortgage foreclosure sale. The interest which the mortgage has conveyed conditionally is thereby vested absolutely in the purchaser. Such purchaser would have obtained all the rights, in respect to the legal title to the land, that the Lake Superior Ship Canal, Railroad and Iron Company acquired through the deed from Avery, Wild & Conant, or that the Union Trust Company acquired through the mortgage from the ship canal company, and which either of these corporations could have asserted against Anthony, Harris & Spalding or Dr. Ayer; and he would have been entitled to any and all remedies, legal and equitable, in respect of the legal title, that either the ship canal company or the Union Trust Company possessed. The legal representatives of Dr. Ayer hold title to the lands in equal right in all respects with this supposed purchaser. The fact that the equity was not separately sold, but in conjunction with other property covered by the mortgage, and that the sum realized for it was small, and that Dr. Ayer had previously acquired the legal title to the land, cannot affect his legal and equitable rights in the premises, or those of his representatives.

Second—The foreclosure decree having embraced the identical interest in respect of which this bill seeks relief, it is a bar to complainant's recovery unless procured by fraud.

Jones on Railroad Securities, Sec. 361.
Campbell vs. R. R. Co., 1 Woods, 368.
Shaw vs. N. C. R. R. Co., 5 Gray, 162.
Richards vs. C. & O. R. R. Co., 1 Hughes, 29.
Story's Eq. Pleadings, Sec. 94.

And it is no less a bar because entered by consent of the parties.

Bank vs. Hopkins, 2 Dana (Ky.), 395.
Dunn vs. Pipes, 20 La. Ann., 276.
Fletcher vs. Holmes, 25 Ind., 458.
Chamberlain vs. Preble, 11 Allen, 370.
Derby vs. Jacques, 1 Clifford, C. C., 425.
Holmes vs. Rogers, 13 Cal., 191.
Gifford vs. Thorn, 1 Stockton, (N. J.), 722.
Edgerton vs. Muse, 2 Hill (S.C.), 51.
Brown vs. Sprague, 5 Denio, 545.
Nashville vs. Taylor, 113 U.S. 266.

Third—Do the averments of the bill support the charge of fraud in procuring the decree?

At the date of Davis' conception of the wicked scheme set forth in the bill, and when he entered upon its accomplishment in company with his co-conspirators named—which the bill avers to have been in March, 1872—what was the position in fact of Averys, Wild & Conant, the canal company, Anthony, Harris & Spalding and the Union Trust Company in respect of the wagon road lands?

The agreement between Anthony & Averys, Wild & Conant bears date April 25, 1871, at least one year, and probably more, before Davis had this dream of wealth.

May 1, 1871, is the date of the deed from Perez J. Avery and Wild & Conant of the 200,000 acres of wagon road land to the canal company. Anthony had only conveyed to them the part of these lands which the State had deeded to him. William L. Avery did not join in the deed, and if, as the bill with its usual vagueness appears to aver, Anthony conveyed the 47,958.85 acres to the two Averys, Wild & Conant, William L. Avery continued then to own an undivided one-fourth of the property, which interest is still outstanding in him or some grantee of his other than the canal company.

Anthony had received $16,000 in money, and there had "been paid to the credit of Anthony, Harris & Spalding, with Averys, Wild & Conant," $36,000 more. If we treat the blind averment of the bill in respect of the last item, as equivalent to averring payment of the money, the gross amount paid was $52,000. This sum was raised on canal company bonds secured by the Union Trust Company mortgage.

The account between the canal company and Averys, Wild & Conant, so far as the facts disclosed in this bill show, was as follows: The former had paid $52,000, and had received a conveyance of a three-quarter interest in 47,958.85 acres of land. The canal company had received an absolute deed from one of the Averys and Wild & Conant of the remainder of the 200,000 acres, but as they had no title, nothing passed by the deed.

Averys, Wild & Conant had the contract obligation of Anthony to acquire the residue of the 200,000 acres, and to convey it to them. The canal company was not a party to the contract, and Averys, Wild & Conant did not assign or transfer their interest or rights in it, or their right to any part of the wagon road land under it, to the canal company.

But the payment by Averys, Wild & Conant to Anthony of $32,000 more was a condition precedent to their right to this conveyance. They had not paid this, and it was then several months past due. The bill offers no excuse or explanation of the failure. It is not averred that Anthony, Harris & Spalding had waived the default.

Anthony, Harris & Spalding were dependent on these payments for the money with which to continue their work on the wagon road and secure title to the remainder of the land, for the bill states that they were indebted in the sum of $30,000 and upwards, and had exhausted their means and credit when the agreement between Anthony and Averys, Wild & Conant was made.

It would appear then that Anthony, Harris & Spalding, at the time Davis conceived the alleged fraudulent scheme and formed the syndicate in furtherance of it, were in position, if they so elected, to rescind the contract with Averys, Wild & Conant, or at any rate to refuse further performance of it.

Now what at the same time was the position of J. C. Ayer & Co., J. Boorman Johnston & Co., and Davis, receiver of the Ocean National Bank, in respect of the canal company and its securities held by them?

They were all creditors of the canal company, and their debts were past due. They held in pledge, as collateral security for this indebtedness, the mortgage bonds of the company of the different issues, each in varying amounts.

In this condition of things it was their legal right to take proceedings to have the bonds sold pursuant to the terms of the contract of pledge. The bill does not aver that this was not done with due regularity and regard for the canal company's legal rights. The burden of the complaint on this point seems to be that the creditors aided each other by each bidding in the bonds of the other at the sale. This was equally devoid of harm to either the canal company or bondholders, and was as clearly their legal right as it was dictated by business sagacity and prudence.

Having thus become owners of the bonds, what was the further position and legal right of these creditors of the canal company? The bonds were in default. This is the inference from the bill's averments. The right to foreclose the mortgages had therefore matured. They asserted this right by causing the foreclosure proceedings to be instituted. Where the offense in this?

But, it is complained, they employed the counsel who conducted the foreclosure suits, and supplied the necessary means to pay him and to meet other expenses. What was

the wrong in this, and to whom? Who else than the bondholders should have furnished the money?

The members of the syndicate were creditors of the canal company, and there was no reason why they should not take steps to have its property sold and to buy it themselves "as cheap as they could get it, provided they cheated or hindered nobody in the matter." (*Wetmore vs. St. Paul, etc., Co.*, 5 Dillon, 531, 536.)

The Supreme Court of Missouri in *Kitchen vs. St. Louis, Kansas, etc., Co.*, 69 Mo., 224, 259, say: "Nor can we consent to say that the creditors of a corporation cannot combine for the purpose of protecting themselves by purchasing its property when legally brought to sale, provided it is no part of the agreement to prevent competition or to use any unfair advantage."

Sahlgard vs. Kennedy, 2 Fed. Rep., 302.
Kropholler vs. St. Paul, etc., R. R. Co., 1 McCrary, 300.
Sahlgard vs. Kennedy, 13 Fed. Rep., 248, 249.

Whatever the motive or purpose of the syndicate, their acts and the means used were lawful to enforce payment of their just debts.

See Groustra vs. Bourges, 141 Mass., 9, and cases cited supra.

And this syndicate of creditors further determined to "buy over Anthony, Harris & Spalding from their allegiance" to the canal company "under their said contract with Averys, Wild & Conant;" and that Ayer should furnish the needed money for this and to complete the wagon road, in consideration of which he should have the wagon road lands. Well, what of it?

In the first place, Anthony, Harris & Spalding owed no "allegiance"—so far as this word has any legal import in this connection—to the canal company. They had no con.

tract relation to the canal company, as I have already pointed out, and therefore were under no legal obligation to it in respect of the unearned land. As the canal company had not undertaken or agreed to buy the land or to pay for it on the one hand, so on the other it was not entitled to demand conveyance of the land.

And in the second place, as we have seen, Averys, Wild & Conant had failed to make the payments required by their contract, and in consequence of this Anthony, Harris & Spalding were legally at liberty to make other arrangements, as they were no doubt in fact forced to do.

In this condition of affairs, what was there wrong in Dr. Ayer's entering into the arrangement stated in the bill, and to whom was the wrong? The averment of the bill in this regard, when reduced to the definite language of proper pleading, is, that Ayer paid Anthony, Harris & Spalding $20,000 in money and furnished the necessary additional sum to enable them to complete the road and secure the remainder of the grant, in consideration of receiving conveyance of the land remaining in the State. I submit that Ayer had the right to do all this, and that he got title to the land unincumbered and unaffected by either the Averys, Wild & Conant contract or the Union Trust Company mortgage.

The alleged arrangement between this syndicate of creditors for securing to Ayer title to the wagon road land, in the event of their having to buy the mortgaged property at the foreclosure sale, when stated without adjectives, seems to have been legitimate in itself and harmless as to everybody. And if so, its accomplishment violated no legal or equitable rule.

The members of the Davis syndicate may have all been bad men, and their motives in instituting the mortgage foreclosure proceedings may have been of the most sordid kind, yet when we drop out the expletives of the bill in charac-

terization of the various acts done, down to and including the decree, and confine the attention to the acts themselves, they all appear to have been quite proper and devoid of wrong or good cause of offense to anybody in interest.

To quote the language of this court in *Ambler vs. Choteau, 107 U. S., 591,* and apply it to this case—"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts, for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damage and other relief he asks."

The fraud charged against the Union Trust Company is equally barren of support in any allegations of fact.

That company was a mere naked trustee, under no obligation even to examine the sufficiency of the security for the bonds provided for. This duty, by the terms of article 9 of the deed of trust, was imposed upon the mortgagor corporation, which engaged to do, at its own proper cost, all things necessary or proper to be done in order to preserve or make effectual the lien or security created, or intended to be, by the deed of trust, and to make all further necessary conveyances to effectuate the purpose of that instrument. The deed further defines the obligations of the trustee and the limit of its engagement. Complainant is chargeable with knowledge of all these limitations. The trustee was not the general agent of the bondholders, but special, limited to the legitimate purposes of the relation which it sustained to the security and to the parties entitled under the trust. By the purchase of bonds under such a mortgage the purchaser voluntarily adopts the security as it *exists in the trustee*, and

becomes *cestui que trust* under it, thereby adopting the trustee as his agent for holding *the existing title* and administering the property to the intents specified in the creation of the trust. It is the duty of persons investing in such securities to elicit the true state of the title.

Miller vs. Rutland, etc., R. R. Co., 36 Vt., 483, 487.

"At first, and so long as prompt payment is made, it is understood, . . . that the office of such trustees is rather silent, and the duties of the trustees, by means of the negotiability of the bonds and coupons attached, are ordinarily performed, or expected to be performed, by the corporation or its officers."

Sturges vs. Knapp, 31 Vt., 1, 54, per Redfield, Ch. J.

Defined and limited as were the rights and duties of this trustee by the terms of the trust, it is absurd to claim that it violated its "duty to attain said legal title, and have the same applied to the benefit of the bondholders, etc." Neither the deed of trust nor the law imposed any such duty. Much less was it incumbent on the trustee to advance its own means for that purpose. The terms of the trust not only gave the trustee no power to use the bonds or their avails for such purpose, but by devoting them to specified uses excluded all others. The bill does not aver that complainant or any other bondholder ever called upon the trustees to acquire the legal title, or offered to provide the funds therefor, before Ayer's dealing with Anthony or afterwards, to contest the claim of Ayer, although it is stated that the success of Ayer's negotiations with Anthony "was published broadcast over the country," and the presumption therefore is, was known to the complainant.

Quite as impotent in support of the charge of fraud is the averment that the foreclosure bill conceded "the legal title

to the residue of the wagon road lands had been lost to the Ship Canal Company and taken out from under the lien of said mortgage by reason of a grant thereof to third parties by the State of Michigan, whereby the lien of said mortgage had been lost." This was but the statement of a fact necessary to be stated in the bill to inform the court of the interest to be dealt with.

The canal company had no title to the 173,000 acres of land. It conveyed none by its deed of trust. If it ever had a "possible equity" in them, through its conveyance from Averys, Wild & Conant, even this had been lost by defaulted payments. Neither the canal company nor the bondholders under the Union Trust Company mortgage, with the fact of the loss of the title "published broadcast over the country," made any effort to save their rights in these lands. I submit it was a stretch of liberality in both bill and decree to style these vanished rights of Averys, Wild & Conant "a possible equity." It was but the admission of a patent fact to concede the legal title had been lost. It was indeed admitting too much to say that an estate which never had been incumbered had been "taken out from under the lien of said mortgage."

But the bill does not negative complainant's knowledge of the filing of the foreclosure bill, and the character of its averments respecting this matter, and of the decree and all that subsequently took place.

The attempt to justify this suit by complainant, instead of the Union Trust Company, must therefore be declared a failure.

Fourth—The bill fails to make a case which would have given to Averys, Wild & Conant, or the canal company, a right in equity to specific performance of their contract with Anthony; and the Union Trust Company, or the bondholders under its mortgage, can have no greater rights in respect of the 200,000 acres of wagon road lands and the

contract in question than Averys, Wild & Conant or the canal company would have had.

As I have already pointed out, giving to the averments of the bill of complaint the most favorable construction for the complainant, the vendees had made default in the payments required by their contract with Anthony, Harris & Spalding in the amount of at least $32,000, and this before it is claimed that Ayer and Davis, or any member of the alleged syndicate had taken any action, or indeed, before the syndicate had been formed. The bill makes no explanation of this default and does not aver a waiver.

To entitle a contract vendee of land to specific performance, he must show either that he has not made default in the performance of the obligations imposed upon him, or if default has been made, that it has been waived. If he applies for relief after long lapse of time, unexplained by equitable circumstances, his bill will be dismissed. It must appear that the remedies are mutual, that there has been no change affecting the character or justice of the contract, that compensation for the delay can be fully given, and that the complainant is in position to perform his part of the contract, etc.

Story's Equity Jurisprudence, Secs. 771, 776, and cases cited.
Denniston vs. Coquillard, 5 McLean, 253.
Boone vs. Missouri Iron Co., 17 How., 341.

The act conferring the grant to aid in building the military road required the completion of the road in five years from March 3, 1863, viz., in March, 1868. May 6, 1870 (16 Stats. at L., p. 121), Congress extended the time for completion to January 1, 1872. The contract between Anthony and the Averys, Wild & Conant was made April 20, 1871, within nine months of the expiration of the extension granted by Congress. The contract (Schedule A) between

Anthony and the State of Michigan required the completion of the road by Anthony "on or before the expiration of the grant *as extended by the act of* Congress" (of May 6, 1870).

The declared and evident purpose on the part of Anthony in the execution of the contract (Schedule B) was, as the bill avers, "to raise the necessary funds for completing said wagon road enterprise by the said Anthony, Harris & Spalding." Time, therefore, and the prompt performance of that contract by the Averys, Wild & Conant was the inducement and very essence of the contract. Anthony promptly conveyed to them 47,958.85 acres of land, and if we accept the equivocal statements of the bill as to the money paid as averments of payments to Anthony, Harris & Spalding, they had received $52,000 under the contract, or a little more than 75 cents per acre for the land conveyed to them. Nothing more was paid, and the work on the road ceased in 1871. No offer to perform was made by the Averys, Wild & Conant or by the canal company. Anthony's rights under his contract with the State of Michigan, and those of his assignees, terminated January 1, 1872. He had no legal right to an extension of time from the State, and the State was powerless to grant such extension, without express authority of Congress, which, though granted April 24, 1872 (17 Stats. at L., p. 56), did not of itself work an extension of Anthony's time.

That was never extended. It was in this condition of things that Ayer advanced the means to complete the wagon road and earn the lands. Averys, Wild & Conant had been in default for a year in their contract with Anthony, and according to the averments of the bill, had nothing left but hope and prospects, Mr. Micawber's capital in trade; and the canal company (if it had any right) was also insolvent, as on August 27, 1872, it was adjudicated bankrupt. Neither Averys, Wild & Conant nor the canal

company could have enforced specific performance against Anthony, as neither was in condition to fulfill the vendees' obligations.

Marble Co. vs. Ripley, 10 Wall., 340, 358.
Bank of Columbia vs. Hagner, 1 Peters, 465.
Boone vs. Missouri Iron Co., 17 How., 340, 343.
Colson vs. Thompson, 2 Wheaton, 336, 342.
Thompson vs. Bruen, 46 Illinois, 125,130.
Russell vs. Nestor, 46 Mich., 290.

If the canal company had any interest, it was subject to the equities of Anthony against the Averys, Wild & Conant.

Jones vs. Lynds, 7 Paige, 301.
Frazier vs. Broadnax, 2 Litt. (Ky.), 249.

It is not alleged that any misrepresentation was made to Anthony, nor any false statement of the pecuniary condition of the Averys, Wild & Conant or the canal company. The sole allegation is that Seager by representations of the "hoplessness" of looking to them for aid, persuaded Anthony to make the arrangement with Ayer.

If Anthony had completed the contract with his own means, I submit there would be no justice in compelling him to convey the fruits to the defaulting vendees or their mortgagee, and a court of equity would in that case dismiss as inequitable a bill against him for specific performance. Ayer succeeded to all the rights, equities and protection to which Anthony was entitled. If Anthony could not be decreed to convey, neither can Ayer's representatives.

Ayer's acquisition of the legal title took nothing from Avery, Wild & Conant or the canal company, which either ever owned. Much less did it affect any legal or equitable right of the complainant or his trustee.

If Ayer had not obtained the legal title, it cannot be assumed in the face of the facts admitted in the bill, notwithstanding the "promised success of the negotiation of the canal company," that either the Averys, Wild & Conant or the canal company, in their admitted impecunious state, could have done so, even conceding that the latter had rights which law or equity could reach in the Anthony contract.

Fifth—The bill contains no explanation of the delay in bringing this suit. The decree of foreclosure complained of was entered on the 13th day of March, 1877, and in June or July following, the decree was executed by the sale of the property. This suit was not instituted until nearly five years and a half after the execution of the decree, eight years after the foreclosure bill was filed, and eleven years after Ayer's alleged interference. There is no claim on the part of complainant that he was not aware of all the facts set forth in the bill, on which he now bases his claim for relief, at the respective dates of their occurrence. He avers everything as of his own knowledge, and not on information and belief. It is stated that he received his proportion of the proceeds realized from the sale of the wagon road land under the decree.

This delay is fatal to complainant's suit. He has slept too long upon his rights, and in the meantime the principal party charged with fraud, and the only one whose estate is to be affected by the relief asked, has died. Others have acquired interests in the property, and evidence has been either wholly lost or its reliability weakened by lapse of time.

There is no longer in the courts of the United States any doubt about the right to raise the question of laches by demurrer.

Landsdale vs. Smith, 106 U. S., 391.
Badger vs. Badger, 2 Wall., 87.

The case of *Harwood vs. R. R. Co.*, 17 Wall., 79, presents a state of facts as to this question difficult to distinguish from those involved here.

See also the following cases:

Gordon's Administrators vs. Ross, 63 Ala., 363.
Evans vs. Bacon, 99 Mass., 213.
Embury vs. Klemm, 30 N. J. Eq., 517.
Spaulding vs. Farwell, 70 Me., 17.
Royal Bank of Liverpool vs. G. J. R. R. & D. Co., 125 Mass., 490.
Campau vs. Van Dyke, 15 Mich., 371.
Inhabitants of Plymouth vs. Russell Mills, 7 Allen, 438.
German Seminary vs. Kiefer, 43 Mich., 105.
Marsh vs. Whitmore, 21 Wall., 178.
Godden vs. Kimmel, 99 U. S., 201.
Credit Co. vs. Arkansas Cent. R. R. Co., 15 Fed. Rep., p. 46.

(*a*) The suit is barred by the State statute of limitations.

The relief sought is that "the residue of said wagon road lands" (viz.: said 173,000 acres conveyed to Ayer by the State) "may be charged with a trust for the payment of the unpaid portion of said 1,300 bonds," etc., and may be sold, etc.

The defendants claim the interest sought to be reached through the sale under the decree of foreclosure.

Whatever right, equity or interest in the residue of said wagon road lands resided in the mortgagor or its assignees in bankruptcy was sold and passed to the purchasers, Ayer's grantors. Any proceeding to disturb the title thus acquired is plainly barred by section 8698, 2 Howell's Annot. Statutes of Michigan, providing that suit must be brought "within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by a sheriff, or other proper ministerial officer,

under the order, judgment, decree or process of a court, or legal tribunal of competent jurisdiction within this State." This suit was not brought until nearly five and one-half years after the confirmation of the foreclosure sale. If the lands could not be reached at law they can not in equity.

McVickar vs. Filer, 31 Mich., 304, 307.
Showers vs. Robinson, 43 Mich., 505, 506.
Smith vs. Davidson, 40 Mich., 632.
Godden vs. Kimmel, 99 U. S., 208, 210.
Sullivan vs. Portland R. R. Co., 94 U. S., 806, 812.

In the foreclosure suit the complainant was represented by the trustee, and the reason and equity of the statute apply against him.

Corcoran vs. Cheapeake Canal Co., 94 U. S., 741.
Shaw vs. R. R. Co., 100 U. S., 605, 611.

(*b*) If the acts complained of, including Ayer's acquisition of the legal title to the lands, constitute ground of action at law or in equity in favor of the canal company, it is clear that Richter has no standing in court. They were injuries to the property and estate of the mortgagor corporation, and passed to its assignees, as the corporation was adjudged bankrupt August 27, 1872.

The Bankrupt Act (Sections 5044, 5046,) declares that all the estate of the bankrupt, real and personal, and all his rights in equity and choses in action, shall vest in the assignee. This includes:

Vested rights *in rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property.

A claim against the United States for proceeds of cotton passed to the bankrupt's assignee.

Erwin vs. U. S., 97 U. S., 392.

All claims for property conveyed by the bankrupt in fraud of creditors pass to his assignees in bankruptcy.

Glenny vs. Langdon, 98 U. S., 22.
Trimble vs. Woodhead, 102 U. S., 647.

Claims of resident aliens bankrupt, against the United States under a treaty with Great Britain, pass to assignees in bankruptcy.

Phelps vs. McDonald, 99 U. S., 298.
Hodgson vs. Sidney, L. R., 1 Exch., 313.

"These words (of Sections 5044, 5046, U. S. Rev. Stat.) were intended to include every kind of vested interest, legal or equitable, in, and all claims, whether founded in contract or in tort, relating to or growing out of, property which the debtor himself, if not adjudged a bankrupt, could in any way assign, or could prosecute in any form, either in the ordinary courts of justice or otherwise."

Leonard vs. Nye, 125 Mass., 455, 468.

The failure of the assignee to sue therefor would not transfer his right of action to the creditor of the bankrupt.

Trimble vs. Woodhead, 102 U. S., 469.

Under these rulings, if the canal company acquired any interest, estate or right in the lands in question, which was invaded or defeated by Ayer's dealing with Anthony and the issue of patents for the land to Ayer, such interest, estate or right, and the right of action for injuries thereto, constituted an asset of the bankrupt corporation which vested in its assignees in bankruptcy, who alone could sue for it.

It is no answer to this to say that the Union Trust Company, as mortgagee, acquired the alleged equity against these lands for the benefit of the bondholders. Whatever right or equity was conveyed by the deed of Averys, Wild & Conant to the canal company vested primarily in the grantee. The breach of the covenants of title in that

conveyance was simultaneous with the execution and delivery of the deed, and a right of action for such breach accrued at once to the canal company, and probably also a right of action against the grantors for the fraud perpetrated in conveying to the canal company a possible equity as and for a full legal title to the lands. The sale made at the instance of the trustee and to which the bondholders were parties, passed to the purchasers all the rights of the mortgagee.

Brobst vs. Brock, 10 Wall., 534.
Gilbert vs. Cooley, Walker's Ch , 494.

If the complainant, as we may fairly infer from his bill, was aware of the existence of this equity, and that the bonds involved were worth "many times" the sum needed to acquire the legal title, to hold that he may recover here is to put the very case of *Trimble vs. Woodhead, 102 U. S., 650.*

Sixth—On the theory that the bill is an original bill to foreclose the mortgage on an interest not reached or disposed of by the former decree, the legal representatives of Dr. Ayer are improper parties, as he would himself have been an improper party to the Union Trust Company bill. His legal title to the land, now vested in his representatives, parties to this suit, was not acquired by him through a conveyance from the canal company made subsequently to the mortgage, but by grant from the State of Michigan and others. Dr. Ayer held, as his representatives now hold, adversely to the title of the mortgagor canal company.

In *Dial vs. Reynolds, 96 U. S., 340*, Justice Swayne uses the following language: "The bill seeks to foreclose the deed of trust, to quiet the title of the trustees, to remove the cloud cast upon it by Reynolds," etc. "It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor

and mortgagee, a party, and litigate and settle his rights in that case. *Barbour, Parties in Equity, 493*, and the cases there cited."

To the same effect are the following cases:

Eagle Fire Co. vs. Lent, 6 Paige, 635.
Bank vs. Walker, 3 Barb. Ch., 438.
Jones vs. St. John, 4 Sandf. Ch., 208.
Bogey vs. Shute, 4 Jones (N. C.) Eq. Rep., 174.
Peters vs. Bowman, 98 U. S., 56.

The case of *Chamberlain vs. Lyell, 3 Mich., 449*, was a bill to foreclose a mortgage in which the mortgagor and his wife were not only made defendants, but one Lyell also, who claimed to have some interest in the property prior to the mortgage, through an execution levy. The bill sought to relieve the property from the lien of Lyell's execution. It was held that no relief could be granted as against Lyell, and that he therefore was an improper party to the suit.

See also the following cases:

San Francisco vs. Lawton, 18 Cal., 465.
Merchants' Bank vs. Thomson, 55 N. Y., 7.
Banning vs. Bradford, 21 Minn., 308.
Pelton vs. Farmin, 18 Wis., 222.
Summers vs. Bromley, 28 Mich., 125.

Seventh—It is impossible to grant the relief sought, or any other relief based on the averments of this bill, without in effect revising the former foreclosure decree of the Circuit Court for the Eastern District of Michigan.

The subject matter of the decree must be the same, namely, the equitable interest of Averys, Wild & Conant in the Anthony contract and the lands covered by it. The difference will be only that here, if the decree entered shall be that indicated in the prayer of the bill, the equity to be dealt with will be specifically designated by name and des-

cription. Or if the mortgage debt were decreed a charge upon the legal title, and a sale of the property should be directed to satisfy it, after paying the amount, to be ascertained, which Dr. Ayer advanced Anthony to complete the wagon road, the result would be the same. Such a revision should have been sought by motion or otherwise in the court in which the decree was granted.

Nougué vs. Clapp, 101 U. S., 551.
Graham vs. Boston, etc., Co., 118 U. S., 161.

Eighth—Counsel for complainant in the court below being pressed by the oral argument against the bill, had recourse, in a subsequent brief, to a theory which he announced substantially as follows: That the bondholders under the Union Trust Company mortgage are entitled to relief from "a fraud practiced upon them by Anthony and his confederates, including the ship canal company and Dr. Ayer and his syndicate," which consisted in an oral understanding between Anthony, Averys, Wild and Conant that they should make "fraudulent papers upon which, in the open market, money was to be borrowed of innocent purchasers of bonds;" that they should make a deed "purporting to convey the legal title of 200,000 acres of wagon road lands to the ship canal company, to 173,000 acres of which they had only an equitable title;" that the ship canal company should "make a mortgage purporting to create a lien upon the legal title to this land, securing bonds to be issued by the ship canal company," etc.

There are at least two answers to this theory.

The first and conclusive answer is, that the bill contains no averment in support of it. It is not even insinuated, much less stated, that the arrangement between Anthony, Averys, Wild and Conant, and the subsequent execution of it, was conceived in iniquity; that it contemplated or had for its purpose a fraud upon the public or any individuals.

This theory of counsel was born of sheer desperation. It was not in the mind of the person who drafted the bill.

A second answer to the theory is, that it was the province of the assignees in bankruptcy to take action to remedy or correct any such fraud as this, and before the complainant could have recourse to a suit on his own account, it must be made to appear that the assignees have refused, upon request, to take proper action. The bill does not charge the bankruptcy assignees with complicity in the alleged frauds of Ayer, Davis and others.

Ninth—The bill does not aver that the alleged frauds affected any right of complainant. It states that he "is the holder as purchaser in good faith of 230 of the issue of 1,300 bonds of $1,000, each secured by said mortgage to the Union Trust Company of New York," etc. The date of his purchase, the parties from whom he bought, the consideration paid, and when it was paid, should be pleaded to entitle him to the position of a bona fide purchaser. Mere averment that he is such will not suffice to give him that character (*Boone vs. Chiles*, 10 Peters, 177).

If complainant bought his bonds since the decree, and sale of which he complains, he is not in position to impeach the title of Ayer to the lands or to assail the decree. The right to complain of a fraud is not a marketable commodity.

Graham vs. Railroad Co., 102 U. S., 148, 155-6.
Sahlgard vs. Kennedy, 13 Fed. Rep., 249.
Brush vs. Sweet, 38 Mich., 575, 578.
De Hoghton vs. Money, L. R., 2 Ch. App., 164.
Hill vs. Boyle, L R., 4 Eq. Cas., 260.

It is to be presumed that complainant has stated the full strength of his title. All doubt should be resolved against him,—the conspicuous absence from the bill of any aver-

ment of ownership at the time of the alleged fraud, and that the acts complained of were in fraud of his rights, coupled with the admission in the bill in reference to the bonds, viz., "which said bonds your orator *represents*," seem to warrant the inference that whatever his interest now is has been acquired since the decree.

E. W. MEDDAUGH,
Solicitor for Defendants, the Ayers.

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IN THE

Supreme Court of the United States.

MORRIS RICHTER
vs.
JEROME *et al.* } No. 839.

MOTION FOR COMMISSION TO TAKE TESTIMONY *de bene esse.*

NOTE FOR THE RESPONDENTS.

The bill of complaint filed by Richter in the Circuit Court of the United States for the Western District of Michigan, in equity, having been demurred to, in respect to a matter going to the merits, the demurrer was sustained the bill dismissed, and an appeal from that decree is now pending in this Court, No. 839.

The complainant files his motion, supported by his affidavit for the issuing of a commission out of this Court, to take the testimony of four witnesses alleged to be aged and infirm, said testimony, when taken, not to be used in this Court but in the court below, provided the decree dismissing the bill is reversed.

Section 863, Revised Statutes, (act of 1789,) does not apply to a case like this, for the reason that there is no cause de-

pending in the District or Circuit Court of the United States, the whole case having been transferred by the appeal to this Court.

Keyser *vs.* Farr, 105 U. S., 265.

The 70th Rule of the Equity Practice of the Circuit Courts of the United States does not apply, because its purpose was to reach only the case where a bill had been filed and no answer had been made thereto. It also required that a bill should be pending in the circuit court, but as none is pending there in this case, and an issue has been made which has determined the result of the controversy, that rule does not meet this case.

The complainant does not, however, invoke, as it is understood, either the last-mentioned rule or the 863d Section Revised Statutes, but rests his motion upon the 917th section Revised Statutes, which gives to this court power to prescribe, from time to time, the forms of writs, process, pleadings and proceedings, and of taking and obtaining evidence, obtaining discovery, &c., and argues that the power to make the 70th rule implies the power to issue a commission in a particular case.

The answer seems obvious, to wit: That the purpose of the statute was to confer upon this Court the power to establish rules of practice, pleading and procedure of general application, and does not apply to matters of special relief in particular cases.

The jurisdiction to grant this motion, or the propriety of granting the same, does not find any support in the fact that in original causes and in appeals in admiralty pending in this Court it is competent to take additional proofs and even frame a new issue, or that in any cause pending in this court there is power and jurisdiction, even after judgment, to take testimony that becomes necessary for the proper determination of any question subsequently arising in this Court, such cases as are provided for by the 12th rule. It is "further proof" which is referred to. In this

case no proof has been taken, nor is any needed in this Court.

It is believed that this Court has never exercised the power invoked by this petition—at least, we are unable to find any instances reported; but we are informed that in one case where there was doubt as to the sufficiency of an appeal bond, testimony was ordered to be taken, and that in another instance where, after judgment had been rendered in this Court, a suggestion having been made that the suit was begun and prosecuted collusively, testimony was ordered to be taken for the purpose of ascertaining the truth of the suggestion, but no case has been found similar to this.

If the complainant, however, is in a position to entitle him to have the testimony *de bene esse* taken, he is not without a well known and adequate remedy. That remedy is by filing an original bill to perpetuate testimony, a perfectly convenient and well known method of procedure.

2d Story's Eq. Jurisprudence, sec. 1505 *et seq.*

And if the Circuit Court for the Western District of Michigan had jurisdiction in the original suit between Morris Richter and the defendants therein, it has jurisdiction between the same parties over a bill to perpetuate testimony, as the subject matter of the suit is land situated in that district.

18 Statutes at Large, 470, sec. 8.

But the petition does not show such a state of facts as is required to take testimony *de bene esse.*

There is no evidence of infirmity of the witnesses, or any statement of it. The age given does not make them "aged or infirm."

There is no evidence of the age of the witnesses, except the belief of the informant of the party of a fact which, if true, could be easily proved.

There is no evidence that either of the witnesses is a sole witness of a single material fact.

The affidavit and petition show that the witnesses are all called, as far as disclosed, to prove the same facts, and there is no disclosure of a material fact known to a single witness only.

The affidavit alleges that Francis W. Anthony *assisted* in putting on the market $1,300,000 of bonds purporting to be secured by 200,000 acres of land, when the Company had the legal title to 47,000 acres and only an equitable title to 153,000.

That Anthony received the money on the bonds from *bona fide* purchasers, who bought on a representation of a legal title in the 153,000 acres, and then colluded with James C. Ayer to procure from the State of Michigan title to the same 153,000 acres.

The affidavit alleges that William L. Avery is a witness to the proceedings of the directors of the L. S. S. C. R. & I. Co. in putting the bonds on the market, and in making the representation as to the title, and as a director knows all of the acts of the directors, Ayer and other defendants, to bring the canal and railroad enterprise to a conclusion.

The affidavit also states that Ayer had the same knowledge as Anthony.

The affidavit represents Samuel L. Smith as a witness to a single material fact, and states the material testimony of Smith to be that Ayer procured the legal title of the 153,000 acres with full knowledge that it was only an equitable title. Smith's testimony is to prove the same fact as Anthony and Avery, Smith being a party to the same transaction.

Alfred Russell is expected to prove the same facts, excepting that he obtained his knowledge as counsel for Ayer, and, therefore, could not disclose.

The four witnesses are stated by the plaintiff as all having knowledge of the transaction described in the bill. Smith and Anthony knew it because they were active parties to the transaction. Avery knew it because he was a director of the company, and Russell knew it only as counsel.

The affidavit of Manning, in opposition to the motion,

states that he is personally acquainted with the said four witnesses. "They are all men of activity and energy, and engaged in the daily prosecution of their business. They all appear to have good and vigorous health and to be in the full possession and enjoyment of all their mental and bodily faculties and in no respect infirm." * * * That Anthony is not over sixty years of age, Avery not more than sixty-five, Smith and Russell not over fifty-five. That they all reside in the State of Michigan, "and on or near the line of railroad which runs to the place of trial."

It is submitted that no jurisdiction, power or authority is shown or exists for granting the relief asked for.

That the issuing of such a commission is not within or according to the established rules and practice of this court.

That the showing of the petition and affidavit does not exhibit a case in which such commission ought to be issued, or the existence of any necessity therefor.

That if the facts warrant the taking of the testimony of the persons named as witnesses, adequate relief is given under the familiar practice of filing an independent bill to perpetuate testimony.

H. H. WELLS,

Solicitor and Counsel in opposition to the motion.